

**CLERK'S COPY.**

**TRANSCRIPT OF RECORD**

---

**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 94**

---

**INTER-ISLAND STEAM NAVIGATION COMPANY,  
LIMITED, PETITIONER,**

**vs.**

**TERRITORY OF HAWAII BY PUBLIC UTILITY COM-  
MISSION OF THE TERRITORY OF HAWAII**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

---

**PETITION FOR CERTIORARI FILED JUNE 6, 1938.**

**CERTIORARI GRANTED OCTOBER 10, 1938.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 94

INTER-ISLAND STEAM NAVIGATION COMPANY,  
LIMITED, PETITIONER,

vs.

TERRITORY OF HAWAII BY PUBLIC UTILITY COM-  
MISSION OF THE TERRITORY OF HAWAII

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

## INDEX.

	Page
Record from Circuit Court of First Judicial Circuit of Hawaii.....	1
Complaint .....	1
Summons and return .....	6
Amended demurrer .....	7
Reservation to Supreme Court.....	9
Clerk's certificate.....	11
Opinion, Perry, J., Supreme Court.....	12
Order overruling demurrer.....	28
Amended answer .....	29
Special demurrer to amended answer.....	38
Stipulation as to certain facts.....	41
Decision, Christy, J. ....	45
Amendment to decision .....	64
Exception to decision .....	65
Judgment .....	66
Exception to judgment.....	67

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 28, 1938.



Record from Circuit Court of First Judicial Circuit of Hawaii—  
Continued.

	Page
Statement of evidence .....	69
Plaintiff's Exhibit "A"—Public Utility Corporation comparative annual statement of fees for years ending December 31, 1913, to December 31, 1930, inclusive.....	69
Plaintiff's Exhibit "B"—Public Utility Corporation statement showing receipts and disbursements, eighteen-year period ending December 31, 1930.....	70
Plaintiff's Exhibit "C"—Analysis of disbursements, Public Utilities Commission, for years 1916-1917.....	71
Defendant's Exhibit "AA"—Statistics compiled by Bureau of Labor and Statistics—Hawaiian Sugar Planters' Association showing tonnage produced from 1922-1931.....	72
Defendant's Exhibit "BB"—Inter-Island S. N. Co., Ltd., segregation of Gross Revenues for years 1922 to 1929.....	73
Defendant's Exhibit "CC"—Inter-Island S. N. Co., Ltd., Segregation of Gross Revenues as Between Passenger and Freight .....	74
Defendant's Exhibit "DD"—Tabulation date August 22, 1933, of Income and Property Taxes paid by the Inter-Island S. N. Co., Ltd., to the Territory of Hawaii, 1922-1932.....	75
Defendant's Exhibit "EE"—Receipts from Freight on Sugar Bags .....	76
Minutes of hearing, April 11, 1933.....	76
Minutes of hearing, April 24, 1933.....	78
Minutes of hearing, May 5, 1933.....	79
Minutes of hearing, January 9, 1934.....	80
Testimony of F. Homer Eaton .....	87
Frederick G. Pearson.....	100
F. Homer Eaton (recalled) .....	106
Arguments of counsel.....	157
Testimony of Stanley Kennedy.....	162
John K. Clarke.....	164
Stanley Kennedy (recalled).....	174
Henry S. Turner.....	206
Stanley Kennedy (recalled) .....	216
Testimony of Herbert T. Martin.....	219
Certificates to statement of evidence.....	226
Proceedings in Supreme Court of Hawaii.....	226
Application for writ of error and notice thereof.....	226
Writ of error.....	229
Return of writ of error.....	231
Assignments of error.....	231
Stipulation as to bond.....	254
Opinion, Banks, J.....	259
Judgment .....	285
Minutes of hearings .....	286
Petition for appeal .....	290
Assignments of error .....	296
Order allowing appeal, etc.....	302

# INDEX

iii

Proceedings in Supreme Court of Hawaii—Continued.	Page
Bond on appeal .....	304
Citation and service .....	306
Praecipe for transcript of record .....	308
Clerk's certificate .....	310
Stipulation re printing of record .....	312
Proceedings in U. S. C. C. A., Ninth Circuit .....	315
Order of submission .....	317
Order directing filing of opinion and judgment .....	317
Opinion, Haney, J. ....	318
Judgment .....	338
Clerk's certificate .....	339
Order allowing certiorari .....	340



In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

THE TERRITORY OF HAWAII, by the PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

Plaintiff,

vs.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Hawaiian corporation,  
Defendant.

DEBT FOR STATUTORY FEES.  
COMPLAINT AND SUMMONS.

[Endorsed]: Filed Jun. 1, 1930.

Returned June 2, 1930. [4\*]

COMPLAINT.

Now comes the Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, Plaintiff herein, and for cause of action against the Inter-Island Steam Navigation Company, Limited, alleges and shows unto the Court as follows:

I.

That the Public Utilities Commission of the Territory of Hawaii, hereinafter called the "Commission", is a public territorial commission, duly constituted and its members duly appointed, qualified and acting under and by virtue of Chapter 132 of

---

\*Page numbering appearing at the foot of page of original certified Transcript of Record.

the Revised Laws of Hawaii, 1925, and amendments thereto, and that the following persons are the duly appointed, qualified and acting members thereof, to-wit: Walter Beall, Member and Chairman; A. J. Gignoux and F. O. Boyer, Members. [5]

## II.

That the Defendant above named, Inter-Island Steam Navigation Company, Limited, hereinafter called the "Company", is a corporation duly organized under the laws of the Kingdom of Hawaii, a political predecessor of the Territory of Hawaii, and is existing under and by virtue of the laws of the Territory of Hawaii, and during all the times herein mentioned, and for a period of more than twenty years last past, has owned, controlled, operated and managed as owner, and still does own, control, operate and manage as owner, numerous steam vessels, wharves, docks and their appurtenances, directly for public use, to-wit: the transportation of passengers and freight between the various ports and points in the Territory of Hawaii, both between the different Islands of the Territory and between different ports and points on each Island of the Territory, except, that on the Island of Oahu the only port of call is the City of Honolulu; and that the said Company is a Public Utility which is subject to investigation by the Commission within the meaning of said Chapter 132, and that its principal business is that of performing public utility services in the Territory, to-wit: the transportation and car-



riage of passengers and freight for hire, as aforesaid.

### III.

That under and by virtue of the provisions of said Chapter 132, and particularly Section 2208, of the Revised Laws of Hawaii, 1925, the said Company is, and at all times herein mentioned has been required, and is and has been under legal obligation to pay to the Territory of Hawaii for the Commission semi-annually in March and September of each year the following payments: [6]

(a) "A fee which shall be equal to one-twentieth of one percent, of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus"

(b) "one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31st of the preceding year".

### IV.

That prior to the year 1922 such fees were regularly paid but since September 26, 1922, the company has consistently refused and neglected to pay such fees or any portion thereof, though frequent demands have been made therefor.

That Plaintiff is informed and believes, and on such information and belief alleges that during the years 1922 to 1929, inclusive, said Company received gross receipts from its public utility business and had issued and outstanding capital stock of the par value, in amounts as follows:

*Inter-Island etc. Co., Ltd.*

Year	Gross Receipts of Utility Business	Par Value of Outstanding Capital Stock
1922	\$1,868,998.40	\$5,000,000.00
1923	2,027,562.48	5,000,000.00
1924	2,171,855.15	5,000,000.00
1925	2,132,292.30	5,150,000.00
1926	2,309,701.60	5,380,000.00
1927	2,565,618.03	5,940,000.00
1928	2,713,026.50	6,500,000.00
1929	2,894,851.76	6,500,000.00

That the said Company by reason of the foregoing gross receipts and outstanding capital stock was required to pay to the Commission during the years 1923 to 1930, inclusive the following sums:

[7]

Year	March	September	Total
1923	\$1,934.50	\$1,934.50	\$3,869.00
1924	2,013.78	2,013.78	4,027.56
1925	2,085.92	2,085.92	4,171.84
1926	2,096.15	2,096.15	4,192.30
1927	2,230.85	2,230.85	4,461.70
1928	2,470.80	2,470.80	4,941.60
1929	2,656.51	2,656.51	5,313.02
1930	2,747.42		2,747.42

or a total of

\$33,724.44

That the aforesaid sums constituting the aforesaid total were and are due and owing from the Company to the Commission; that the Commission has made frequent demands upon the Company for the payment thereof, but that the Company has at all times refused and still refuses and neglects to pay the same or any portion thereof, and that there is now due and owing from the Company to the

Commission the sum of ~~\$33,724.44~~ for the said years 1923 to 1930, inclusive.

Wherefore, Plaintiff prays for judgment against the Defendant in and for the total sum of \$33,724.44, together with interest upon the sums constituting the said total sum, at the rate of 8% per annum from the dates on which the said sums respectively become due, together with its costs, attorney's commission and fees, and prays that process in due form of law issue out of this court, citing and summoning Defendant to appear and answer this complaint.

Dated: Honolulu, T. H., May 8th, 1920.

**TERRITORY OF HAWAII,**

**By H. R. HEWITT,**

**Attorney General. [8]**

**PUBLIC UTILITIES COMMISSION**

**TERRITORY OF HAWAII,**

**By SMITH & WILD**

**By J. RUSSELL CADES,**

**Its Attorneys.**

**Territory of Hawaii,**

**City and County of Honolulu.—ss.**

J. Russell Cades, being first duly sworn on oath deposes and says: That he is associated with Smith and Wild, Attorneys for the Public Utilities Commission of the Territory of Hawaii; that he is duly authorized to and does make this verification on behalf of said Commission; that he has read the foregoing complaint and knows the contents thereof,

and that the same is true except as to those matters therein set forth upon information and belief, and that as to those he believes them to be true.

J. RUSSELL CADES.

Subscribed and sworn to before me this 31st day of May, 1930.

[Notarial Seal] FRIEDA H. ROBERT,  
Notary Public, First Judicial Circuit,  
Territory of Hawaii. [9]

L. No. .... Reg. .... Pg. ....

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

[Title of Cause.]

### TERM SUMMONS.

The Territory of Hawaii:

To the high sheriff of the Territory of Hawaii, or his deputy; the sheriff of the City and County of Honolulu, or his deputy, or any police officer in the Territory of Hawaii making service hereof:

You are commanded to summon the above named defendant, in case it shall file written answer within twenty days after service hereof, to be and appear before the First Circuit Court at the Judiciary Building in Honolulu, at the term thereof pending immediately after the expiration of twenty days after service hereof; to show cause why the claim of the above named Plaintiff should not be awarded pursuant to the tenor of the annexed Complaint.

And have you then there this Writ with full return of your proceedings thereon.

Witness the Honorable Presiding Judge of the Circuit Court of the First Judicial Circuit at Honolulu aforesaid, this 2nd day of June, 1930.

[Seal]

D. K. SHERWOOD,

Clerk.

**SHERIFF'S RETURN.**

Served the within Summons on C. H. Wikander, Asst. Cashier Inter-Island Steam Navigation Co., Ltd., at Honolulu this 2nd day of June, 1930, by delivering to him a certified copy hereof and of the complaint hereto annexed and at the same time showing him the original.

Dated June 2, 1930.

DAVID F. S. LEONG,

Police Officer [10]

---

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

[Title of Cause.]

**AMENDED DEMURRER.**

[Endorsed]: Filed Sep. 18, 1930. [11]

Now comes Inter-Island Steam Navigation Company, Limited, defendant in the above entitled cause and demurs to the complaint filed by the plaintiff in said cause, on the following grounds:



## I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

## II.

That since the enactment by the Congress of the United States of its Act of March 28, 1916, (39 Stat. at L. c. 53, p. 38) ratifying Act 135 of the Session Laws of Hawaii, 1913, as amended by said Act of March 28, 1916, and the enactment by the Congress of the United States of its Act of September 7, 1916, (39 Stat.) at L. c. 451, p. 728) the Territory of Hawaii and the Public [12] Utilities Commission of said Territory have been and still are respectively without jurisdiction over the public utility business of this defendant in any respect or for any purpose.

## III.

That it does not appear in or by said complaint that this defendant or any part of its business is subject to investigation by said Commission, or that this defendant is liable by law to pay any of the fees contemplated by Section 17 of Act 89 of the Session Laws of Hawaii, 1913, (as amended by Act 127 of the Session Laws of Hawaii, 1913), now Section 2207 of the Revised Laws of Hawaii, 1925, or otherwise.

Wherefore, this defendant asks the judgment of this court whether it shall be required to make any other or further answer to plaintiff's complaint.

Dated, Honolulu, T. H., September 18th, 1930.

INTER-ISLAND STEAM  
NAVIGATION COMPANY,  
LIMITED,

By SMITH, WARREN, STANLEY &  
VITOUSEK,

ROBERTSON & CASTLE,

Its Attorneys. [13]

---

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.]

RESERVATION TO SUPREME COURT  
RECORD.

CLERK'S CERTIFICATE:

[Endorsed]: Filed Oct. 1, 1930. [14]

The above entitled matter came on to be heard before the above entitled court on defendant's amended demurrer to plaintiff's complaint, and the court deeming the questions raised by said amended demurrer to be important, and the court entering a well founded doubt as to whether said demurrer should be sustained or overruled,

Now therefore, by virtue of the power in me vested under the provisions of Section 2513 of the Revised Laws of Hawaii, 1925, and upon the joint motion of the plaintiff and defendant, I, the undersigned Judge of said court, do hereby reserve to

the Supreme Court of the Territory of Hawaii, for its consideration and judgment, the following questions of laws:-

Question 1. Is the public utility portion of defendant's business subject to investigation by the plaintiff under Chapter 132 Revised Laws of Hawaii?

Question 2. Is the Defendant liable by law to pay any of the fees contemplated in Section 2207, Revised Laws of Hawaii, 1925? [15]

Question 3. Should defendant's said demurrer be sustained upon any ground therein stated?

The court hereby reports and certifies to said Supreme Court so much of the record in said cause as is necessary for the understanding of the questions herein involved, as follows:

(1) Complaint and Summons.

(2) Amended Demurrer.

Dated: Honolulu, T. H., this 1st day of October, 1930.

/s/ WILLIAM C. ACHI,

Judge.

Approved as to form:

SMITH & WILD,

By J. R. CADES,

Attorneys for Plaintiff.

SMITH, WARREN, STANLEY &

VITOUSEK,

ROBERTSON & CASTLE,

Attorneys for Defendant. [16]

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.].

**CLERK'S CERTIFICATE.**

I, John Lee Kwai, a Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, do hereby certify that the foregoing documents, to-wit:

- (1) Complaint and Summons.
- (2) Amended Demurrer

attached hereto, are full, true and correct copies of the original documents which are on file in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and being in Law No. 12809, the same being entitled, "The Territory of Hawaii, By the Public Utilities Commission of the Territory of Hawaii, Plaintiff, vs. Inter-Island Steam Navigation Company, Limited, an Hawaiian corporation, Defendant, Debt for Statutory Fees."

Witness my hand and the seal of the Circuit Court, First Judicial Circuit, Territory of Hawaii, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 1st day of October, A. D. 1930.

[Seal]

/s/ JOHN LEE KWAI

Clerk, Circuit Court, First  
Judicial Circuit, Territory of  
Hawaii. [27]

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.]

OPINION OF THE SUPREME COURT.

[Endorsed]: Filed October 8, 1931. [28].

Argued, September 21, 1931.

Decided October 8, 1931.

Perry, C. J., Banks and Parsons, JJ.

Commerce—public utilities—investigation—proceedings.

The provisions of Act 89, L. 1913, (R. L. 1925, §§2193 and 2201), authorizing the public utilities commission of this Territory to investigate all public utilities doing business in this Territory and to institute and prosecute appropriate proceedings before the interstate commerce commission or the shipping board for the correction of illicit practices pursued by any public utility, are not repealed by implication by the Act of Congress of September 7, 1916, known as the Shipping Board Act.

Same — interstate commerce — definitions — public utilities.

A corporation engaged in the transportation of passengers and freight between different ports of the islands of this Territory is not engaged in "commerce between the several states" within the meaning of article I, section 8, of the Constitution of the United States, but is engaged in "interstate commerce" within the meaning of that term as it is used in the Shipping Board Act. Such a cor-



poration, so engaged, is a public utility within the meaning of Act 89, L. 1913 (R. L. 1925, c. 132.).

Same—public utilities—investigation—fees.

The public utilities commission of this Territory has jurisdiction to investigate the rates, classifications, acts, omissions and practices of the Interisland Steam Navigation Company, a corporation created and existing under the laws of Hawaii and doing business in transporting passengers and freight between different ports within this Territory; and may exact from that corporation the fees prescribed by section 17, Act 89, L. 1913 (R. L. 1925, §2207). [30]

---

#### OPINION OF THE COURT BY PERRY, C. J.

This is an action brought by the public utilities commission of this Territory on behalf of the Territory against the Interisland Steam Navigation Company, Limited, for the recovery of \$33,724.44 claimed to be due from the defendant to the plaintiff for statutory fees under Act 89, L. 1913, and amendments thereto (now chapter 132, R. L. 1925, relating to the public utilities commission). The theory of the declaration is that the defendant is subject to investigation by the public utilities commission, hereafter to be called "the commission," and to the payment of the fees prescribed by the statute as representing the cost of such investigations. The defendant demurred to the declaration on the following grounds: (1) that the declaration

does not state a cause of action; (2) "that since the enactment by the Congress of the United States of its Act of March 28, 1916 (39 Stat. at L. c. 53, p. 38), ratifying Act 15 of the Session Laws of Hawaii, 1913, as amended by said Act of March 28, 1916, and the enactment by the Congress of the United States of its Act of September 7, 1916 (39 Stat. at L. c. 451, p. 728), the Territory of Hawaii and the public utilities commission of said Territory have been and still are respectively without jurisdiction over the public utility business of this defendant in any respect or for any purpose;" and (3) "that it does not appear in or by said complaint that this defendant or any part of its business is subject to investigation by said commission; or that this defendant is liable by law to pay any of the fees contemplated by section 17 of Act 89 of the Session Laws of Hawaii, 1913 (as amended by Act 127 of the Session Laws of Hawaii, 1913), now section 2207 of the Revised Laws of Hawaii, 1925, or otherwise." [31]

Upon the filing of the demurrer the circuit judge reserved for the consideration of this court the following questions: 1. "Is the public utility portion of defendant's business subject to investigation by the plaintiff under chapter 132, Revised Laws of Hawaii?" 2. "Is the defendant liable by law to pay any of the fees contemplated in section 2207, Revised Laws of Hawaii, 1925?" 3. "Should defendant's said demurrer be sustained upon any ground therein stated?"

It appears from the declaration that the defendant is a corporation created and existing under the laws of Hawaii and that during all of the times involved in this action it "has owned, controlled, operated and managed as owner, and still does own, control, operate and manage as owner, numerous steam vessels, wharves, docks and their appurtenances, directly for public use, to-wit: the transportation of passengers and freight between the various ports and points in the Territory of Hawaii, both between the different islands of the Territory and between different ports and points on each island of the Territory, except that on the Island of Oahu the only port of call is the city of Honolulu."

By Act 89, L. 1913, the legislature created a public utilities commission of three members and provided that the commission should have "the general supervision hereinafter set forth over all public utilities doing business in the Territory" and should "perform the duties and exercise the powers imposed or conferred upon it by this chapter." R. L. 1925, §§2189, 2192. In section 18 of the same Act the term "public utility" as used in the Act was defined to "mean and include every person, company or corporation, who or which may own, control, operate or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license articles of association, or [32] otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation

of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

R. L. 1925, §2208. It is clear that the defendant corporation is a public utility within the meaning of the Act under consideration. This is expressly admitted in the defendant's brief on file in this case.

Much has been said in the briefs on the subject of whether or not by the Act of March 28, 1916 (39 Stat. L. 38, c. 53), amending, ratifying, approving and confirming Act 135, L. 1913, Congress placed the defendant corporation under the jurisdiction of the public utilities commission of the Territory of Hawaii. We fail to see the importance or the relevancy of this question, since it clearly appears that by Act 89, L. 1913, the defendant was placed under the jurisdiction of the commission and since it further appears with equal clearness that by the Act of March 28, 1916, the jurisdiction of the commission over the defendant was neither expressly nor impliedly withdrawn or modified. The Act of March 28, 1916, placed certain franchise-bearing corporations under the juris-

diction of the commission. It is vigorously contended that the defendant has at no time received a franchise from the Territory or its predecessors. Assuming the latter to be true, it may be that under the expression, inserted by Congress, "and all public utilities and public utilities companies organized or operating within the Territory of Hawaii," the defendant corporation was included and was thereby declared to be [33] under the jurisdiction of the commission. But if that expression cannot be so construed and has not that operation (on the theory that even in that expression franchise-bearing corporations only were referred to), nevertheless the defendant had already been placed by Act 89 under the jurisdiction of the commission. If the Act of March 28, 1916, dealt only with franchise-bearing corporations, it was because the assent of Congress was under the Organic Act necessary to validate legislation affecting their franchises. No intent is evident in that Act to subtract from the jurisdiction of the local commission.

Concerning the construction of Act 89, L. 1913, the defendant expressly concedes, and we think correctly, that "such authority as the Territory has over public utilities has in fact been granted to the public utilities commission" of this Territory. It contends, however, that such power, if any, as the Territory ever had to regulate or investigate this particular public utility, to-wit, the defendant corporation, was wholly withdrawn by the Act of Con-



gress of September 7, 1916, known as the "Shipping Board Act."

In creating this Territory Congress provided that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." Organic Act, §55. Certain limitations to this general statement are contained in the same section, but they are not material for the purposes of this case. It has long since become well established judicially that the investigation and the regulation of public utility corporations is a rightful subject of legislation. There is no question in this case whether this Territory has "reserved powers" similar to those withheld by the States in the adoption of the national Constitution. Congress has the undoubted, constitutional [34] right to govern this Territory and in the exercise of that right was authorized to delegate, as it did, to the local legislature the power to legislate on "all rightful subjects of legislation," subject to the limitations stated. In 1913, therefore, when Act 89 was passed and before the Shipping Board Act was passed, the legislature had the power to create the public utilities commission and to give it the grants of authority which are involved in this case, provided only that in so doing it violated no provision of the Constitution of the United States and subject always to the power of Congress to repeal or to modify, directly or indirectly, Act 89.

The provision under which fees are herein claimed from the defendant is to be found in section 17 of

Act 89, L. 1913 (R. L. 1925, §2207), reading as follows: "Finances. All salaries, wages and expenses, including traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the [35] par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

In section 1 of the Shipping Board Act of September 7, 1916, Congress provided that "the term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession." It is contended on behalf of the defendant that by virtue of this congressional declaration the defendant corporation, which is engaged in the transportation of passengers and freight "between places in the same territory," is engaged in interstate commerce, that the fees prescribed by section 17 of Act 89 are a burden upon this interstate commerce and that therefore the requirement of section 17 that the defendant pay the fees named is unconstitutional. It is interesting to note that the expression "interstate commerce" is not used in the constitutional provision relied upon by the defendant in this connection. The language of that provision (Article I, section 8) is that "the Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Whatever room for construction might have been afforded if the constitutional expression had been "interstate commerce," there can be no doubt that commerce [36] "among the several States," even assuming that that may mean commerce among one or more states on the one hand and a territory on

the other, does not mean or include commerce between two or more points wholly within the same state or commerce between two or more points wholly within the same territory, particularly when no passage over or through another state or territory is necessary or is had in order to go from the one to the other of the two points within the same state or within the same territory. Surely if there were two lakes connected by a navigable river, whatever its length, the lakes and the river being all entirely within the same state or territory, transportation in ships between points in one lake and points in the other lake could not possibly be held to be commerce "among the several States" within the meaning of the constitutional provision. The meaning of that expression, as used in the Constitution presents a question purely judicial. The effect of the expression cannot be added to or modified by congressional enactment.

Nor is there any reason for supposing that in giving the definition just quoted from section 1 of the Shipping Board Act Congress intended to define or in any wise modify section 8 of Article I of the Constitution. It had ample authority to make the provision under its constitutional power (Article IV, section 3) "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" and doubtless was acting under that authority. The definition was intended to indicate the meaning of the expression "interstate commerce" as used in that Act and not as used in the Constitution. In so far, therefore, as the power of

Congress to regulate commerce "among the several States" is concerned, the requirement of fees measured by the public utility [37] business done by the defendant corporation solely between places within this Territory is not a burden upon commerce between states and is not a violation of that constitutional provision.

Section 13, Act 89, L. 1913 (R. L. 1925, §2201), reads as follows: "If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the



necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best." Under this section the commission is authorized to investigate the acts and omissions of the defendant and, if it deems them to be unlawful, to institute and [38] prosecute appropriate proceedings before the interstate commerce commission or the shipping board or any other body thereunto properly authorized in order to secure relief from the unlawful practices complained of. Does the Shipping Board Act withdraw or limit this power? The Shipping Board Act authorizes the shipping board to regulate the rates, fares, charges, classifications, tariffs and practices of every "common carrier by water in interstate commerce" which, for the purposes of the Act, includes the defendant corporation and, it may be assumed, to make all investigations necessary for the complete exercise of the power of regulation.

It is the contention of the defendant that the grant of power to the shipping board is so broad and complete that there is no room left for any investigation by the local commission, that the exercise by the local commission of a power to investigate would be unduly harassing and that Congress intended to vest exclusive power of investigation in the shipping board. With this contention we feel unable to agree. When an individual proposes to complain to the shipping board or to the interstate



commerce commission of unlawful practices of a public utility, it is the part of wisdom, usually followed, that that individual should first investigate and ascertain the facts to the best of his ability. There certainly can be no impropriety or conflict of authority in empowering the local commission, as the representative of this Territory, to make a complaint before the shipping board or any other authorized body of illegal practices or acts claimed by it to have been committed by a public utility. The Territory as a whole is certainly interested in seeing that the law, whether federal or local, is observed in all respects by its public utilities. Should the Territory be denied the privilege which belongs to every individual of investigating and ascertaining the facts before making formal [39] complaint to the body authorized to regulate? Should it not have the power to make an investigation that will be complete and effective? And if it is authorized, as it is by Act 89, to make an investigation which is complete and effective,—solely for the purpose of placing the facts before the body authorized to regulate—can this power or its exercise be held to be in conflict with the power of the shipping board to regulate or with the intent of Congress that the shipping board alone should regulate? We think not. In our opinion the power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom

it may see fit to regulate. Under these circumstances, there can be no repeal by implication.

Similar statutes, some conferring the power only to make complaint and some conferring the power to investigate as well as the power to complain, have been enacted in many states. See, for example: Ala. Code, 1928, §9669; Crawford & Moses, Dig. Stat., Ark., 1921, §1630; Struckmeyer, Rev. Code, Ariz., 1928, §691; Henning's Gen. Laws, Cal. (Hyatt, Pt. 2, 1920), §34, p. 2518; 2 Park's Ann. Code, Ga., 1914, §§2645, 2646, 2647; Code of Iowa, 1927, §§7890, 7891; Rev. Stat., Kan., Ann., 1923, §66-148; 1 Bagby, Ann. Code, Md., Art. 23, §384, p. 835; Gen. Stat., Minn., 1923, §§4719, 4721, 4660; 1 Rev. Stat., Mo., 1909, §3253; Cahill's Cons. Laws, N. Y., 1930, c. 49, §59, p. 1878; 1 Cons. Stat. Ann., N. C., 1919, §1075, p. 464; 2 Pub. Laws, N. H., 1926, §§22, 23, p. 923; Pa. Stat., 1920, §18135, p. 1750; 2 Comp. Laws, S. Dak., 1929, §§9577, 9578, p. 3264; 1 Wis. Stat., §1797-21, p. 1536. These statutes are apparently in force and acted upon in these various states. No decision that any of them [40] is unconstitutional has been called to our attention. In *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957, 980, the court, commenting on the Oregon statute above mentioned, said: "But by section 47 it is made the duty of the commission to investigate freight rates on interstate traffic on railroads in the state, and when, in the opinion of such commission, the rates are excessive or discriminatory, to present the facts thereof to the offending railroad company, and, if without avail, then to apply to the interstate commerce commis-

sion for relief. From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the legislature of the state to enter the domain of interstate regulation of railroad traffic. The commission is a state commission, designed to render state service, and no intendment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the Act, and upon its face it is not inimical to the commerce clause of the national Constitution." We, too, think that in our legislature's authorization to the public utilities commission to investigate and to present the facts to the shipping board, if necessary, there is nothing inimical either to the commerce clause of the national Constitution or to the provision of Congress authorizing the shipping board to regulate the rates, practices, etc., of the defendant corporation.

The power to legislate on all rightful subjects of legislation was given to the legislature by the Organic Act in unambiguous terms. The intent to withdraw that power from the legislature, in so far as mere investigations of and complaints against a public utility doing business within this Territory are concerned, is not discernible in the Shipping Board Act.

Since the power to investigate exists, the power to [41] exact fees to defray the expenses of such investigations follows. There is no contention in the case at bar that the exactions of the statute are

so clearly unreasonable and confiscatory as to be invalid; therefore there will be no examination into that question.

In the case entitled *Re I.-I. S. N. Co.*, 24 Haw. 136, it was held that the local commission had no jurisdiction to regulate the rates and charges of the defendant corporation; but the question of whether the commission had the power to investigate or to exact fees was not before the court and was not considered. Similarly, in the case entitled *In re Hawaii Telephone Co.*, 26 Haw. 508, it was held that the local commission has no jurisdiction to regulate the rates or charges of telephone companies operating wholly within the Territory of Hawaii. In that case, also, the power to investigate or to exact fees was not involved and was not considered. We find nothing in either of these two opinions to require conclusions other than those herein<sup>e</sup> reached.

The question whether this is one of the instances in which, Congress having acted under the interstate commerce clause, the state or territory may not lawfully act, need not be considered,—because it is undoubted that Congress, under its constitutional power to govern the territories, can legislate fully on the subject and can exclude action by the territorial legislature. Congress has acted, to a certain extent. The question is, has our legislature acted in conflict with the statute of Congress? When Congress has given to the interstate commerce commission or to the shipping board the power to regu-

late and even, it may be assumed, to investigate the public utilities of Hawaii, including the present respondent, is it in conflict with [42] that grant and mandate for our legislature to authorize the public utilities commission to investigate and to present petitions to the interstate commerce commission or to the shipping board? For the reasons above stated, we think not.

The first and second questions reserved are answered in the affirmative. The third question is answered in the negative.

/s/ ANTONIO PERRY.

/s/ JAS. J. BANKS

/s/ CHARLES F. PARSONS

J. R. Cades (Smith & Wild on the briefs) for plaintiff.

J. G. Anthony and C. D. Pratt (Smith, Warren, Stanley & Vitousek and Robertson & Castle on the briefs) for defendant. [43]

---

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

[Title of Cause.]

ORDER OVERRULING DEMURRER.

[Endorsed]: Filed Oct. 31, 1931. [44]

Pursuant to the opinion of the Supreme Court of the Territory of Hawaii rendered and filed in that certain cause entitled "The Territory of Hawaii, by the Public Utilities Commission of the



Territory of Hawaii, Plaintiff, vs. Inter-Island Steam Navigation Company, Limited, a Hawaiian corporation, Defendant, Reserved Question From the Circuit Court, First Judicial Circuit, Territory of Hawaii," being numbered 1984, in the files of said Supreme Court on the 8th day of October, 1931, notice of which decision has been duly given this Court by Notice dated the 20th day of October, 1931,

It is hereby ordered that the amended demurrer of the Defendant be and the same is hereby overruled, and the said Defendant is given leave to answer over within Ten (10) days of the filing of this Order.

Dated: Honolulu, T. H., this 31 day of October, 1931.

[Seal]

A. M. CRISTY,

Judge, Circuit Court First  
Judicial Circuit, Territory of  
Hawaii. [45]

---

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

**AMENDED ANSWER.**

Ⓢ [Endorsed]: Filed Nov. 2, 1933. [46]

Comes now Inter-Island Steam Navigation Company, Limited, defendant above named, and in answer to plaintiff's complaint heretofore filed herein says that it denies each and every material allega-



tion in said complaint contained, and defendant further says that it is under no obligation to pay any fees whatsoever to the plaintiff for the following reasons:

### I.

That it is not a public utility subject to investigation by the plaintiff within the meaning of Chapter 132 of the Revised Laws of Hawaii, 1925, as amended, and that plaintiff has no jurisdiction over the business of this defendant;

### II.

That defendant is engaged in the business of transporting passengers and freight by water on the high seas, operating [47] its vessels between the several islands of the Hawaiian group; that during the years 1922 to 1929 inclusive, the larger vessels plying between the Territory of Hawaii and the mainland of the United States or foreign countries rarely stopped at any of the ports of the Territory of Hawaii except the ports of Honolulu and Hilo; that in order to transport sugar and other freight or passengers from any island of the Territory of Hawaii (other than the island of Oahu where the port of Honolulu is located) to the mainland of the United States or to foreign countries, it was necessary to route the same through Honolulu or Hilo and to transport such passengers, sugar and other freight from the smaller ports of the Territory of Hawaii to the port of Honolulu, Oahu, or Hilo, on the vessels of the defendant for delivery to and transshipment on overseas vessels; and in order

to transport freight and passengers from the mainland of the United States or foreign countries to ports of the Territory) other than Honolulu or Hilo, it was necessary to route such freight and passengers through Honolulu or Hilo and to transport the same from Honolulu or Hilo on the vessels of the defendant to such ports of the Hawaiian group.

### III.

That defendant, for the years 1922 to 1929 both inclusive, pursuant to the laws of the Territory of Hawaii then in force (Chap. 93 Revised Laws 1915, Chap. 102 Revised Laws 1925), paid real and personal property taxes to the Territory of Hawaii in the total sum of \$1,072,585.98, which taxes for each of the aforesaid years were computed and assessed at the universal rate then prevailing in the Territory and were based upon the full value of defendant's business as an enterprise for profit; that defendant, for the years 1922 to 1929 both inclusive, pursuant [48] to the laws of the Territory of Hawaii then in force (Chap. 94 Revised Laws 1915, Chap. 103 Revised Laws 1925), paid all of its territorial income taxes in the total sum of \$195,502.57 and all other taxes and impositions provided by law excepting the fees herein sought to be collected; that the income taxes and the real and personal property taxes aforesaid were assessed to and paid by said defendant at the same rate as those assessed to and paid by all other persons, corporations and public utilities within said Territory all in accordance with the statutes of the Territory of Hawaii;

## IV.

That during the said years 1922 to 1929 both inclusive, defendant has been engaged in commerce between the Territory of Hawaii and the mainland of the United States and foreign countries. That \$3,291,417, or 18% of the gross receipts of the defendant during the years aforesaid were derived from the following sources:

(a) \$2,429,302. from the transportation of raw sugar from the several ports on the islands of Hawaii, Kauai and Maui to the port of Honolulu or Hilo, which raw sugar was shipped by the plantations from their mills to the mainland of the United States for refining, said defendant being engaged from time to time to transport the same in its vessels from the islands of Hawaii, Kauai and Maui to Honolulu or Hilo for transshipment on overseas vessels destined for and in fact reaching the mainland of the United States, both the shippers and the defendant knowing that said raw sugar was destined for vessels bound for the mainland of the United States pursuant to a long established [49] course of business whereby raw sugar had been transported from the islands aforesaid to the mainland of the United States via the ports of Honolulu or Hilo; that no raw sugar transported by the defendant has been nor could it have been sold or disposed of in the Territory of Hawaii, but had to be and in fact always was, transshipped to the mainland

of the United States for refining; that wherever possible such shipments of raw sugar were unloaded from the defendant's vessels directly into overseas vessels bound for the mainland of the United States, but where such connections were not feasible such raw sugar was temporarily stored in warehouses for no purpose other than to await the arrival of an overseas vessel to carry the same to the mainland of the United States, and in such latter cases such sugar was stored temporarily for purposes of transshipment only; that in all cases such raw sugar was delivered to and transshipped on overseas vessels, either directly from defendant's vessels or from wharves in Honolulu and Hilo Harbors, in the same condition and in the original packages as it was when such raw sugar was delivered to and received by said defendant;

(b) \$852,115. from the carriage of mails and the transportation of freight and passengers for the United States of America;

#### V.

That during the years 1922 to 1929 inclusive, defendant carried freight shipped from foreign countries destined for and consigned to various ports of the Hawaiian Islands other than Oahu, such freight being deposited by vessels from [50] foreign countries on wharves in Honolulu Harbor or Hilo, and stored temporarily for the purpose of immediate reshipment on defendant's vessels to its ultimate destination, all of such freight being de-

livered to and reshipped on defendant's vessels in the identical condition and in the original packages as it was when the same was delivered to and received by defendant; that said defendant is unable to state the exact amount of such freight from foreign countries by reason of the fact that it is impossible to ascertain at this time, but that said freight so received and transshipped was of a substantial amount, the gross receipts from such freights on one item alone, to-wit, sugar bags from India for the years 1925 to 1929 inclusive, amounting to \$86,672;

#### VI.

That during the years aforesaid defendant carried substantial quantities of freight, other than sugar, between the ports of the Territory of Hawaii, which shipments were either the initial step in the journey to the mainland of the United States or the final step in the journey from the mainland of the United States to ports within the Territory of Hawaii under the circumstances set forth in paragraph IV. (a) and V hereof; that it is impossible at this time to state the precise amount of the gross receipts from such freight.

#### VII.

That defendant has paid real and personal property taxes for said years 1922 to 1929 aforesaid, as more fully set forth in paragraph III hereof, which said taxes were the total lawful taxes to which the defendant was subject under the laws then in force



and which were based upon the full value of its [51] property as an enterprise for profit, and which were assessed in accordance with law in the same manner as taxes upon other persons, corporations and public utilities in the Territory and computed at the uniform tax rate then prevailing; that the imposition and collection of the taxes or fees herein sought to be collected, in addition to the property taxes heretofore paid by said defendant, will amount to more than a property tax which could be or could have been lawfully imposed in any and all of said years upon the public utility property of the defendant assessed at its full value in accordance with the law applicable to other persons, corporations and public utilities;

#### VIII.

That the tax or fees demanded by plaintiff; based upon the gross receipts of defendant's business of transportation of freight and passengers by water on the high seas, constitutes an unreasonable burden upon interstate commerce and is invalid under the Constitution of the United States, and more particularly under Article I, Section 8, thereof;

#### IX.

That the tax or fees demanded herein, based upon the gross receipts of the defendant's business as a common carrier, are in conflict with the Act of Congress of September 7, 1916, 30 Statutes at Large, Chapter 451, page 728, by reason of the fact that the Congress of the United States, pursuant to said



statute, has taken over the whole field of the regulation of the business of the defendants as a common carrier by water on the high seas and has vested jurisdiction exclusively in the United States Shipping Board; [52]

#### X.

That the fees or taxes (\$33,724.44) herein claimed and demanded are unjust, arbitrary, excessive and unreasonable, and bear no reasonable relation to the cost of inspection or investigation of defendant's business by said Public Utilities Commission, and that at all times for which said fees or taxes are herein claimed and demanded the plaintiff has failed to perform any services or make any inspection whatsoever for or with respect to the business of this defendant, except that the account books of the defendant were examined by the auditor of the Public Utilities Commission on three occasions for a period of less than one hour each, for the sole purpose of obtaining figures upon which said fees or taxes herein demanded could be computed; that the fair value of such services during the years aforesaid is not more than \$30, and that the collection of said tax or fees is arbitrary and in violation of the 5th and 14th amendments of the Constitution of the United States;

#### XI.

That the imposition and collection of the taxes or fees herein sought to be collected under the circumstances herein set forth imposes a burden upon

commerce between the Territory and the United States and between the Territory and foreign countries, and between the different ports of said Territory, in violation of Article I, Section 8, clause 3, of the United States Constitution, and in violation and in derogation of the exclusive power vested in Congress to control and regulate such commerce; and in violation and derogation of Article IV, Section 3, clause 2; Article I, Section 8, [53] clause 18; and Article I, Section 8, clause 1, of the United States Constitution; and imposes a tax upon exports in violation of Article I, Section 10, clause 2, and Article I, Section 9, clause 5, of the United States Constitution; and imposes a tax upon imports in violation of Article I, Section 10, clause 2; of the United States Constitution; and imposes a tax upon the government of the United States of America and upon its instrumentalities and upon the exercise of its functions contrary to the provisions of the United States Constitution and in excess of the power of the Territory of Hawaii; and operates to deprive the defendant herein of its property without due process of law in violation of the 5th and 14th amendments of the United States Constitution.

Dated, Honolulu, T. H., October 13th, 1933.

INTER-ISLAND STEAM

NAVIGATION COMPANY,  
LIMITED,

By SMITH, WARREN, STANLEY &  
VITOUSEK and

ROBERTSON & CASTLE

By J. G. ANTHONY

Its Attorneys.

**Territory of Hawaii**

**City and County of Honolulu—ss.**

Stanley C. Kennedy, being first duly sworn, on oath deposes and says: That he is the President of the Inter-Island Steam Navigation Company, Limited, the corporation making the foregoing answer, and as such is authorized to make and makes this verification on its behalf; that he has read the foregoing amended answer, knows the contents thereof, and that the same is true, to the best of his knowledge and belief.

**STANLEY C. KENNEDY**

Subscribed and sworn to before me this 13th day of October, 1933.

[Notarial Seal] **CHARLES Y. AWANA**

Notary Public, First Judicial Circuit, Territory of Hawaii. [54]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

**SPECIAL DEMURRER TO AMENDED  
ANSWER**

[Endorsed]: Filed Jan. 6, 1934, 11:47 A. M.

Receipt of a copy of the within Special Demurrer to Amended Answer is hereby admitted this 6th day of January, 1934.

**ROBERTSON & CASTLE**

Attorneys for Defendant. [55]

Comes now The Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, Plaintiff above named, by its attorneys, Smith, Wild & Beebe, and demurs specially to the amended answer heretofore filed by the Defendant above named for the following reasons:

(1) That the Defendant has not in and by said amended answer stated any matter or thing which constitute a defense to the complaint of the Plaintiff filed herein.

(2) That it appears in and by said complaint that the Defendant is engaged in the business of a "Public Utility" as defined by the terms and provisions of Section 2208 of the Revised Laws of Hawaii 1925, and that the portion of the gross receipts referred to in said amended answer is and constitutes in every case a portion of the "gross income from the public utility business carried on by such public utility in the Territory" as such clause is used in Section 2207 of the Revised Laws of Hawaii 1925. [56]

(3) That Act 89 of the Laws of 1913 of the Territory of Hawaii creating a Public Utility Commission which said Act as amended is now Chapter 132 of the Revised Law of Hawaii 1925 as amended, has by Act of Congress on March 28, 1916, 39 Stats. at Large 38, c. 53, been ratified and approved by Congress and made specifically applicable to the business of said defendant in every respect.

(4) That it appears in and by said amended answer that the Defendant is liable to pay all of the sums demanded by the complaint filed herein.

Wherefore Plaintiff Respectfully Prays that judgment may be entered as prayed for in the complaint heretofore filed.

Dated: Honolulu, T. H., January 6th, 1934.

THE TERRITORY OF HAWAII  
By THE PUBLIC UTILITIES  
COMMISSION OF THE  
TERRITORY OF HAWAII,  
Plaintiff,

By SMITH, WILD & BEEBE

By J. RUSSELL CADES

Its Attorneys [57]

#### NOTICE

To Inter-Island Steam Navigation Company, Limited, a Hawaiian Corporation, and Smith, Warren, Stanley & Vitousek and Robertson & Castle, its attorneys:

You and each of you will please take notice that the foregoing Demurrer will be presented to the Honorable A. M. Cristy, Judge of the above entitled Court, on Tuesday, the 9th day of January, 1934, at the hour of 9:00 o'clock A. M. in his Court Room in the Judiciary Building, Honolulu, T. H., or as soon thereafter as counsel may be heard.

Dated, Honolulu, T. H., January 6th, 1934.

SMITH, WILD & BEEBE  
By J. RUSSELL CADES

Attorneys for Plaintiff. [58]



In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii.

STIPULATION

[Endorsed]: Filed Apr. 6, 1933. [59]

It Is Hereby Stipulated by and between the Territory of Hawaii by the Public Utilities Commission of The Territory of Hawaii and Inter-Island Steam Navigation Company, Limited, by their respective attorneys:

I.

That the Public Utilities Commission of the Territory of Hawaii, hereinafter called the "Commission", now is and at all times hereinafter mentioned was a public territorial commission duly constituted and its members duly appointed, qualified and acting under and by virtue of Chapter 132, Revised Laws of Hawaii, 1925, and Amendments thereto; that on May 8, 1930, the following persons were the duly appointed, qualified and acting members thereof, to-wit: Walter Beall, Member and Chairman, A. J. Gignoux and F. O. Boyer, Members; that since the institution of this action Walter Beall has died and mem- [60] ber A. J. Gignoux has been appointed chairman in his stead and Harry S. Hayward has been appointed a member of said Commission;

II.

That the defendant above named, the Inter-Island Steam Navigation Company, Limited, is a corporation duly organized under the laws of the Kingdom of Hawaii, a political predecessor of the



Territory of Hawaii, and is existing under and by virtue of the laws of the Territory of Hawaii; that at all times herein mentioned said corporation has owned, controlled, operated and managed, as owner, and still does own, control, operate and manage as owner, numerous steam vessels, wharves, docks and real and personal property incidental thereto directly for public use, to-wit: the transportation of passengers and freight between the various ports of the Territory of Hawaii, both between the different islands of the Territory of Hawaii and between different ports on each island of the Territory, except that on the Island of Oahu, the only port of call is the City of Honolulu; that said defendant is a common carrier between the different ports in the Territory of Hawaii as aforesaid, and that its principal business is that of performing the services of a common carrier of passengers and freight for hire as aforesaid;

### III.

That said defendant, during the years 1922 and 1929 inclusive, received gross income derived from its business as a common carrier in the transportation of passengers and freight, and had issued and outstanding capital stock of par [61] value during said years, in amounts as follows:—

Year	Gross Income	Par Value of Outstanding Capital Stock
1922	\$1,868,998.40	\$5,000,000.00
1923	2,027,562.48	5,000,000.00
1924	2,171,855.15	5,000,000.00
1925	2,132,292.30	5,150,000.00
1926	2,309,701.60	5,380,000.00
1927	2,585,618.03	5,940,000.00
1928	2,713,026.50	6,500,000.00
1929	2,894,851.76	6,500,000.00

## IV.

That the Public Utilities Commission has made demand upon said defendant to pay the following fees under and by virtue of the provision of said Chapter 132, particularly Section 2208 of the Revised Laws of Hawaii:

Year	March	September	Total
1923	\$1,934.50	\$1,934.50	\$3,869.00
1924	2,013.78	2,013.78	4,027.56
1925	2,085.92	2,085.92	4,171.84
1926	2,096.15	2,096.15	4,192.30
1927	2,230.85	2,230.85	4,461.70
1928	2,470.80	2,470.80	4,941.60
1929	2,656.51	2,656.51	5,313.02
1930	2,747.42		2,747.42

or a total of ..... \$33,724.44

That said defendant has at all times refused to pay the same or any portion thereof;

## V.

That said Commission, during the years 1923 to 1930, inclusive, has performed no services specifically on behalf of the defendant and has made no investigation of the defendant, except from time to time it has examined the defendant's books to determine the amount of its gross income and the [62] amount of its capital stock outstanding, for the purpose of determining the amount of fees claimed to be due;

That from and after August 7th, 1923, the defendant has made no report to the Commission of accidents caused by or occurring in connection with its operations and service; that during the period of 1923 to 1930 no complaints have been filed with the Commission against the defendant requiring in-

vestigation; and that during said period the defendant has at all times contended and still does contend that the Commission is without jurisdiction to make any investigation and that the Act of July 1, 1913, (Act 29, S. L. 1913) of the Legislature of the Territory of Hawaii (now Chapter 132 of the Revised Laws of Hawaii, 1925, as amended), has no application to the defendant.

Dated, Honolulu, T. H., this 5th day of April, 1933.

**TERRITORY OF HAWAII**  
By **THE PUBLIC UTILITIES**  
**COMMISSION OF THE**  
**TERRITORY OF HAWAII,**  
Plaintiff,

By **SMITH, WILD & BEEBE,**  
By **J. RUSSELL CADES**  
Its Attorneys.

**INTER-ISLAND STEAM**  
**NAVIGATION COMPANY,**  
**LIMITED,**  
By **SMITH, WARREN, STANLEY &**  
**VITOUSEK, and**  
**ROBERTSON & CASTLE**  
By **J. G. ANTHONY**

Its Attorneys. [63]

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

[Title of Cause.]

DECISION

[Endorsed]: Filed 1934 Apr. 12, PM 4:00. [64]

This is an action in debt filed by the Territory of Hawaii on June 2nd, 1930, claiming that the defendant is indebted to the Territory under the provisions of Sec. 2207, R. L. 1925 for failure to comply therewith for each year commencing with 1923 to and including March 1930. The amount of indebtedness claimed by the Territory is the sum of \$33,724.44.

The defendant resists the action on the following grounds: (1)—That the defendant is not subject to investigation by the public utilities commission; (2)—That Congress has taken over the field by enactment of the shipping board act, 39 S. T. at L. C. 45, and the local commission is without jurisdiction over the defendant. These two contentions defendant admits for the purpose of the hearing before this court have been decided adversely by our supreme court [65] as shown in the decision in 32 H. 127. This decision is binding upon this court.

The defendant further resists the action on the grounds: (3)—That the exactions of the statutes are arbitrary, excessive and unreasonable and bear no relation to the reasonable cost of investigation; (4)—That the statute is in violation of the 5th and 14th amendments of the Constitution of the United States; (5)—That the defendant is engaged in "interstate commerce" and by reason thereof that the Territory is without power to impose a burden

upon the carriage of freight, passengers and mails by the defendant for the United States; (7)—That the exactions of the statute are imposed upon the entire operations of the defendant and hence are wholly void or in the alternative the statute does not apply to the defendant; (8)—That the charges in question, if investigation fees are invoked, are a burden on interstate commerce or in the alternative that as investigation fees they cannot be sustained; (9)—That at least the exactions of the statute are void in so far as they affect services for the United States or for interstate and foreign commerce and on the par value of defendant's capital stock; (10)—That the exactions of the statute are inseparable and must fail if void in part; (11)—That the act of Congress, 39 Sts. at L. 38, c. 53, (found on pages 2102 to 2103, Volume 2, R. L. 1925), has no bearing on this cause.

This cause was heard jury waived after a stipulation was filed April 6th, 1933, wherein it was agreed by the parties: [66]

1. That the public utilities commission of the Territory, hereinafter called the commission, was the duly qualified and acting commission during all times covered by the complaint;

2. That the defendant is a corporation duly organized under the laws of the Kingdom of Hawaii a political predecessor of the Territory and is existing under and by virtue of the laws of the Territory; that the defendant has owned and still owns, controls and operates numerous vessels and other property incidental to the transportation of passengers and freight exclusively between various ports of the Territory; that the defendant is a



common carrier between the different ports of the Territory.

3. That the gross income and the par value of the capital stock of the defendant for the years 1922 to 1929 inclusive are as follows:

Year	Gross Income	Par Value of Outstanding Capital Stock
1922	\$1,868,998.40	\$5,000,000.00
1923	2,027,562.48	5,000,000.00
1924	2,171,855.15	5,000,000.00
1925	2,132,292.30	5,150,000.00
1926	2,309,701.60	5,380,000.00
1927	2,585,618.03	5,940,000.00
1928	2,713,026.50	6,500,000.00
1929	2,894,851.76	6,500,000.00

4. That pursuant to said gross income and par value of outstanding capital stock and under the provisions of Chap. 132, R. L. 1925, the commission has made demand upon the defendant and the defendant has refused and failed to pay upon such demand the following computed fees or charges:

[67]

Year	March	September	Total
1923	\$1,934.50	\$1,934.50	\$3,869.00
1924	2,013.78	2,013.78	4,027.56
1925	2,085.92	2,085.92	4,171.84
1926	2,096.15	2,096.15	4,192.30
1927	2,230.85	2,230.85	4,461.70
1928	2,470.80	2,470.80	4,941.60
1929	2,656.51	2,656.51	5,313.02
1930	2,747.42		2,747.42

or a total of 33,727.44

5. That the commission during the years 1923 to 1930 inclusive has performed no services specifically on behalf of the defendant and has made no investigation of the defendant except from time to

time it has examined the defendant's books to determine the amount of its gross income and the amount of its capital stock outstanding for the purpose of determining the amount of fees to be due; that from and after August 7th, 1923, the defendant has made no report to the commission of accidents and no complaints have been filed with the commission against the defendant requiring investigations; and that during said period the defendant has continuously contended that the commission is without jurisdiction to make any investigation under act 89, S. L. 1913 (now chapter 132, R. L. 1925 as amended) and that the same has no application to the defendant.

The record shows that by act 89 S. L. 1913 the legislature of the Territory created the public utilities commission and defined its powers and duties. This act as amended comprises chapter 132 R. L. 1925. By section 4 of act 89 (section 2192 R. L. 1925) the commission was given general supervision "over all public utilities doing business in the Territory". Section 5 of act 89 (section 2193 R. L. 1925) defined the powers of investigation including among other things to be investigated [68] "each public utility doing business in the Territory \* \* \* its compliance with all applicable territorial and federal laws \* \* \*". Section 13 of act 89 (Section 2201 R. L. 1925) provided that the commission may make recommendations and bring suits. Among other things it states: "the commission shall have power to examine into any of the matters referred to in section 2193 (section 5 of act 89) not with-

standing that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate *proceedings* or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best”.

Section 14 of act 89 (section 2202 R. L. 1925) give certain plenary powers which might grow out of investigation in relation to fixing of rates “\* \* \* in so far as it is not prevented by the Constitution or laws of the United States \* \* \*”.

Section 17 of act 89 (section 2207, R. L. 1925) provided for the collection of fees to support the commission, to be charged and collected from “each public utility that is subject to investigation”. These fees when collected were to be set apart solely to support *the existence*, and *services* required, of the commission.

Section 18 of act 89 (section 2208, R. L. 1925) defined the term public utility to include every corporation [69] which may own, control, operate or manage \* \* \* and plant or equipment—directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance of transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of in-

telligence by electricity by land or water or air between points within the Territory, etc. Section 20 of act 89. (section 2210 R. L. 1925) provided that the act should not apply to commerce with foreign nations, or commerce with the several states of the United States, "except in so far as the same may be permitted under the Constitution *and laws* of the United States".

By act 127, S. L. 1913, section 17 of act 89 relating to the charging and collection of fees for the support of the commission was amended in regard to the rates. By act 135, S. L. 1913 certain enumerated prior franchises and the companies to which they related were made subject to act 89 S. L. 1913 and placed under the public utilities commission instead of the superintendent of public works. This act might be construed as "subject to approval by Congress", although quare.

In 1916 Congress had before it the question of ratifying act 135 S. L. 1913. In acting upon this question Congress not only ratified act 135 but also included the following language " \* \* \* and all franchises heretofore granted to any other public utility or public-utility company, *and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii*, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges *and in all other respects to the pro-* [70] *visions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creat-*

*ing a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith: Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commission under the Acts of Congress to regulate commerce: And provided further, That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory". L. 1913, C. 135; am. and as am. ratified, etc., Mar 28, 1916, 39 Sts. at L. 38, c. 53; Vol. II R. L. 1925 pg. 2103. (Italics by the Court)*

There is no question in the record but that the defendant in the case at bar was a public utility "operating within the Territory" at the time of the passage of act 89 S. L. 1913 and at the time of the Congressional ratification in 1916. It is undisputed that the defendant's business at all times since it began doing business under the Kingdom of Hawaii up to the present time has been the transportation of freight and passengers solely between the islands and ports of the Territory. There is no contention that the defendant itself operates or performs any



service between ports within the Territory [71] and ports on the mainland of the United States or foreign countries, except in so far as goods picked up at way ports may themselves be starting on a journey to ports outside of the Territory requiring trans-shipment at Honolulu to other vessels of other companies and bound for destinations beyond territorial waters; or except as other goods brought from distant ports to Honolulu are picked up by defendant's boats for distribution to points of consignment or ultimate destination on other islands of the Territory.

In other words, at the time Congress had before it the provisions of act 89 S. L. 1913, the defendant corporation was already in the business outlined above and has continued the same character of business in increasing volume subsequently. The actual services rendered by the defendant is a service of transportation wholly within territorial waters and between territorial ports regardless of destination or origin of goods.

The defenses presented by the defendant under the points 3 to 11 inclusive recited hereinbefore are various expressions of two main contentions:

A. That act 89 S. L. 1913 as ratified by Congress on March 28th, 1916 does not apply to the defendant; and—

B. That if the act purports to apply to the defendant it is void, or in the alternative is expressly excepted in connection with the language of section 2210 R. L. 1925, as an illegal and unreasonable in-

interference with interstate commerce. There can be no dispute of the legal proposition that the regulation and control of interstate commerce is wholly under the original power of Congress. Without the express sanction of Congress no [72] invasion of or burden upon interstate commerce can be entered upon directly or indirectly by any state or territorial authority of its own motion. This fact was recognized in the language of section 2210 R. L. 1925 when originally enacted in 1913. But by the enactment of 39 Sts. at L. 38, c. 53, Congress not only ratified the general delegation of section 55 of the Organic Act as it might involve utilities operating in the Territory but also expressly sanctioned and adopted the commission in Hawaii as its agency for the purposes therein expressed as set forth in the language of the act hereinbefore covered. "All public utilities and public utility companies organized or operating within the Territory of Hawaii" were made subject to act. 89, S. L. 1913. The commission in Hawaii was required by the language of said act to exercise the powers set forth in the act as an agency of Congress with the limitation that the powers of the commission should not limit the powers of the interstate commerce commission.

Later on in 1916 Congress passed the shipping board act. In 1917 the supreme court of the Territory determined that this act limited the plenary powers of the commission in Hawaii as to regulating the rates of the defendant. *Re I. I. S. N. Co.*, 24 H. 136. That was the sole material question at

issue in the case cited. In other words, no matter what other power might be expressed in the language of act 89 S. L. 1913 as ratified and adopted by Congress and no matter what requirement of watchfulness might devolve upon the commission as representative of the public, this case merely de-[73] termines that out of any investigations conducted by the commission affecting the defendant there could no longer follow the plenary powers of direct regulation of rates. This power of commanding adjustment of rates was held to have passed to the shipping board, so far as defendant is concerned.

Then in an earlier phase of reserved questions in the case at bar, the supreme court was called upon to determine whether the requirement and powers of investigation over the defendant existed at all in the commission by virtue of act 89 S. L. 1913 as appearing in chap. 132 R. L. 1925. See *Territory vs. I. I. S. N. Co.*, 32 H. 127, decided October 8th, 1931. In this later decision our local supreme court decided affirmatively that the defendant was subject to investigation by the commission. To be sure the following language appears in the decision of the court: "Much has been said in the briefs on the subject of whether or not by the Act of March 28, 1916 (39 Stat. L. 38, c. 53), amending, ratifying, approving and confirming Act 135, L. 1913, Congress placed the defendant corporation under the jurisdiction of the public utilities commission of the Territory of Hawaii. We fail to see the importance

or the relevancy of this question, since it clearly appears that by Act 89, L. 1913, the defendant was placed under the jurisdiction of the public utilities commission of the Territory of Hawaii. We fail to see the importance or the relevancy of this question, since it clearly appears that by Act 89 L. 1913, the defendant was placed under the jurisdiction of the commission and since it further appears with equal clearness that by the Act of March 28, 1916, the jurisdiction of the commission over the defendant was neither [74] expressly nor impliedly withdrawn or modified". It may be that the state of the pleadings that were before the supreme court in the case at bar did not clearly show the relevancy of the discussion as to the extent of Congressional ratification of act 89 S. L. 1913 in the enactment by Congress of March 28th, 1916 above referred to. However, that may be, the amended pleadings require a decision upon this point.

Under these amended pleadings and the evidence allowed by the court over the objection of the Territory it appears that at least 75% of the annual gross receipts for freight of the defendant are derived from transporting freight coming into at lease one of the following classes.

(1) Sugar and other freight originating at way ports of the Territory and consigned thru Honolulu direct to mainland or foreign ports, picked up by defendant at such way ports and conveyed to Honolulu for trans-shipment without material break in the thru journey; or

(2) Freight originating from mainland or foreign ports consigned to various points outside of Honolulu, but in the Territory, which are picked up by the defendant at Honolulu for distribution to the ports of destination within the Territory; or

(3) Transportation of mails and other services rendered directly to the United States government.

There can be no dispute that the goods themselves coming within the foregoing classification are involved in interstate and foreign commerce as that expression is understood under the decisions. But since the charges or exactions or taxes (whatever is the proper name to be [75] given the exactions under section 2207, R. L. 1925) are not levied upon the goods themselves, no useful purpose will be served by any discussion of the refinements in numerous cases cited which involve levies on personal property of this character.

Counsel for defendant called the attention of the court to the case of *Galveston Railway vs. Texas*, 210 U. S. 217, 52 L. ed. 1031, in which the gross receipts tax about to be levied by the state of Texas upon a railway performing services solely within the state in transporting goods involved in interstate commerce was held to be an invalid interference by the state of Texas with the powers of Congress to regulate commerce. It is clear that under this decision the legislature of the Territory by itself without authority traceable to Congress would have no power to require of the defendant in the case at bar a payment of the charges provided in section 2207. The power over interstate commerce



is by this decision and others of the same category resident with Congress in the first instance.

But the complete answer to defendant's position is that the Congress which has this final and sole authority, acted in 1916 under 39 Stat. 38 c. 53, (if not before under Organic Act, s. 55), and expressly adopted the commission in Hawaii as its agency to have such powers over any public utilities operating within the Territory, so long as the commission did not interfere with the interstate commerce commission; and, under subsequent legislation, as it should not interfere with the jurisdiction of the shipping board. These two federal bodies [76] have by acts of Congress certain exclusive plenary powers put Congress had before it in 1916 the fact that the legislature of the Territory had created a public body to act as a watcher over public interests affected by the activities of public utility companies operating in the Territory. (For cases on construction in light of surrounding circumstances see, *N. Y. etc. Ry. v. I. C. C.*, 200 U. S. 361; *Komada & Co. v. U. S.*, 215 U. S. 392; *St. Paul etc. Co. v. Phelps*, 137 U. S. 528; *Danciger v. Cooley*, 248 U. S. 319, 326; *N Y. v. Knight*, 192 U. S. 21; *Alward v. Johnson*, 282 U. S. 509). With that knowledge Congress expressly adopted this same body as its agency, simply modifying the plenary powers that might result from the existence of such a watchful, supervisory commission.

The act in question recognized that there might be such modification of plenary action and in that

connection required of the commission that it act as the representative of the public when necessary to carry forward before appropriate other bodies such suits and proceedings as might in its judgment be necessary to remedy any condition found thru its watchfulness. That this duty and power of investigation has not been taken away from the commission, has been decided and confirmed by the supreme court. It seems equally clear that the duty of prosecuting actions before appropriate federal bodies when necessary also remains as a requirement of Congress upon the commission. The decisions of the supreme court heretofore referred to have thus far only approached this question from the negative side to-wit: That Congress, with knowledge that the legislature of the Territory had created this commission with wide [77] powers, did not exclude from the jurisdiction of the commission anything except the plenary powers under the interstate commerce commission and under the shipping board act.

It is the opinion of this court that Congress has gone further than a mere failure to exclude. It has by the act of March 28th, 1916 expressly adopted the machinery provided by the Territory as the Congressional machinery affecting all utility companies whether wholly local in these operations or incidentally affecting matters which could be denominated interstate and foreign commerce. In view of this approval and adoption by Congress and in view of the fact that Congress has wider powers within and under the Territory than it has in connection with states of the Union, this court cannot see that

any useful purpose would be furthered by entering into a refinement of discussion of the cases involving the validity of state legislation. It may be safely assumed that Congress was aware of the location of Hawaii, distant from the mainland and acted or refrained from further modification of local action with such obvious facts in view. As to the Territory, Congress was a fully informed "superior".

Again whether it be correct, as said in this decision, that Congress has affirmatively adopted the territorial machinery as its machinery over public utilities regardless of the character of business being local or interstate, or whether it be more correct to approach the problem in the manner of the latest decision of the supreme court of the Territory that the [78] omission of Congress to exclude any utility company from the general operation of the territorial machinery becomes an implied ratification,—seems to this court to be immaterial. From either point of view Congress had before it in 1916 the fact that the legislature of the Territory had created a machinery for watching over public interests in connection with public utilities. It was more than obvious that such regulation and watchfulness would involve utility companies that might have an incidental connection with interstate commerce if residents of Hawaii were to enjoy the right of being an integral part of the United States. The legislature said in its enactment that it would not apply to "commerce with foreign nations, or commerce with the several states, except in so far

as the same may be permitted under the Constitution and laws of the United States". Congress adopted this enactment by express reference and with no exceptions. By its adoption this court construes the fact to be that Congress has acted in regard to all public utilities knowing that the exactions of section 2207 R. L. 1925 were to be segregated exclusively into a fund to pay for the existence of this agency which was to watch over companies performing public utilities service for the people of the Territory. Or it might just as well be said that the failure of Congress to make any exception is in that negative way an approval and adoption to the extent of all duties and powers not expressly excluded by Congress of the agency created locally in this distant part of the United States, whose duty expressly involved watching over all utilities [79] and presenting the public's cause before the proper federal agency in case of necessity.

The defendant has asked the court to make a finding that during the year 1922 to date "no services were ever performed by the public utilities commission in connection with the defendant utility, and that the only time spent by the public utilities commission on the business of this defendant was on three separate occasions of one-half hour each" in which the auditor of the commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed \$30.00 gross. It is a fact that only such service as indicated was in fact rendered di-

rectly as a service which could be characterized as "on behalf of the defendant".

But it must be noted at this point that there is another question involved: not simply service rendered to the defendant but also the requirement of supervision and watchfulness the necessity for which is created by the very fact of a corporation entering the field of public utility service. As to general authority to tax such corporations see, *Kansas etc. R. Co. v. Botkin*, 240 U. S. 227; *St. Louis etc. R. Co. v. Middlekamp*, 256 U. S. 226. See also, *Delaware Railroad Tax*, 18 Wall 206, 21 L. ed. 888; *Horn Silver Mining Co. v. N. Y.*, 143 U. S. 305.

When such corporations are permitted to do business affecting the public and are granted permission by the government, then it becomes the duty of the government to its citizens that agencies representing the [80] public be continuously existent to supervise the activities of such companies so that the public's interest in appropriate service be protected. To be sure it might be said that the expense of such supervision should be borne out of general taxes. Yet on the other hand it might equally be said that no need for supervision exists until these corporations begin to function. Hence a method of meeting the new expense of public supervision could equally well be provided by special tax on the corporations whose business creates the necessity, segregating the proceeds for the purpose of bearing the expenses in the field



requiring the service. These questions are matters of legislative policy in distributing the tax burden in such a way as to have a reasonable and general application. If Congress by creating other federal agencies has affected the necessities of supervision by the local commission over the defendant so that further and other classification of expense charges or taxes of such a supervisory body as the local commission could be legitimately advocated, the remedy in that respect is with the legislature or Congress and not with the court.

It might also be noted that the question here under dispute is not solely one as to whether or not benefits were derived by the defendant for the existence of the commission but the reverse may also be true that the mere existence of the commission as an agency to watch and investigate on its own motion without turning a hand toward such investigation is of itself a detriment to conduct *inimicable* to the public [81] by a utility. And the mere existence of a public body ready to act if necessary involves expense which legislation has *solely* placed upon those companies engaged in utility business. This expense has been distributed equally and without discrimination.

The methods of this division of expense were before Congress in 1916. They were adopted and approved by Congress without any exceptions. Such adoption and approval without exceptions by the Congress which had the final authority to limit the provisions, sufficiently answer all the contentions of

the defendant. For cases involving assent by Congress to regulations affecting commerce, see *In re Rahrer*, 140 U. S. 545; *Rabst v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925; *Phillips v. Mobile*, 208 U. S. 472, 52 L. ed. 578; *De Bary & Co. v. La.*, 227 U. S. 108; *Foppiano v. Speed*, 199 U. S. 501, 50 L. ed. 288.

The plaintiff has called attention to the fact that a ruling on the special demurrer interpolated in the proceedings was held in abeyance by this court. In view of the conclusion on the merits of the case as hereinbefore stated it is unnecessary to further rule upon the demurrer inasmuch as the same effect is reached by the conclusions of this court that the plaintiff has established its case; that section 2207 applies to the defendant; that said section was adopted by the Congress as indicated herein either by direct affirmation or by ratification construed from a total absence of any exceptions under existing conditions, in which the defendant was at the time in question engaged [82] in the character of business placed by Congress under the supervision of the local commission.

Let judgment issue in favor of the plaintiff and against the defendant in the amount prayed for, including interest, costs, etc., in accordance with law.

Dated at Honolulu, T. H. this 12th day of April,  
A. D. 1934.

[Seal]

A. M. CRISTY

Second Judge, First Circuit Court,  
Territory of Hawaii. [83]

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii.

[Title of Cause.]

ADDITIONAL CITATIONS  
AMENDMENT TO DECISION

[Endorsed]: Filed Apr. 14, 1934. [84]

Where language in an act is plain and unambiguous it needs no construction: In re the suggested application of the doctrine "nocitur a sociis", argued by counsel, the court calls attention to the following cases raising other principles of construction. The act of Congress under construction as well as the original act of the legislature of Hawaii (135, L. 1913) recited all the territorial legislature franchise acts then in existence, see R. L. 1925 Vol. II, p. 1980 et seq. The general language then following in the act of Congress which was added by Congress, would have no meaning if confined to term "franchise". The obvious, express class is, "all public utilities operating in the territory". This is plain and all conclusive. It needs no "construction"; nor can the title restrict the plain language thereof. [85]

See U. S. v. Fisher, 2 Cranch 358, 385-397 (Marshall, Ch. J.), 2 L. ed. 304, 313-317. Pennock v. Dialogue, 2 Peters 1, 7 L. ed. 327. Yerke v. U. S., 173 U. S. 439, 43 L. ed. 760. Texas v. Chiles, 21 Wall, 488, 22 L. ed. 650. Boudinot v. U. S., 11 Wall. 616, 20 L. ed. 227. Lewis v. U. S., 92 U. S. 618, 23 L. ed. 513. U. S. v. Ewing, 184 U. S. 140,

46 L. ed. 471. *American Express Co. v. U. S.*, 212 U. S. 522, 53 L. ed. 635. *Caminetti v. U. S.*, 242 U. S. 470, 61 L. ed. 442. *Commissioner v Gottlieb*, 265 U. S. 310, 68 L. ed. 1031.

Dated at Honolulu, Hawaii, April 14, 1934.

[Seal]

A. M. CRISTY

Second Judge, 1st Judicial Circuit,  
Territory of Hawaii. [86]

---

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

[Title of Cause.]

EXCEPTION TO DECISION

[Endorsed]: Filed Apr. 20, 1934. [87]

Comes now Inter-Island Steam Navigation Company, Limited, defendant above named, and hereby excepts to the decisions of the above entitled court made and entered April 12th, 1934, and April 14, 1934, and each and every part thereof, upon the ground that said decisions are contrary to the law and the evidence:

Dated: Honolulu, T. H., April 20th, 1934.

SMITH, WARREN, STANLEY &  
VITOUSEK and

ROBERTSON & CASTLE,

By J. G. ANTHONY,

Attorneys for Defendant.

The foregoing exception is hereby allowed.

[Seal]

A. M. CRISTY

Presiding Judge. [88]

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

[Title of Cause.] .:

### JUDGMENT

[Endorsed]: Filed Apr. 20, 1934. [89]

This action came on regularly for hearing on April 11th, 1933, before this Court, the Honorable A. M. Cristy, Judge of said Court presiding, jury waived, when the Plaintiff appeared by its attorneys, Smith, Wild & Beebe, and the Defendant appeared by its attorneys, Robertson & Castle and Smith, Warren, Stanley & Vitousek, and after hearing the evidence and the arguments of counsel the Court rendered and filed its decision in writing herein on April 12th, 1934, finding that the Plaintiff is entitled to recover of the Defendant the sum of Thirty-three Thousand, Seven Hundred Twenty-four and 44/100ths Dollars (\$33,724.44) together with interest and costs; now, therefore, pursuant to said decision,

It is ordered, adjudged and decreed, that the Plaintiff, The Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, have and recover of the Defendant Inter-Island Steam Navigation Company, Limited, the sum of Thirty-three Thousand, Seven Hundred Twenty-four and 44/100ths Dollars (\$33,724.44) together with interest thereon in the sum of Nineteen Thousand, Seven [90] Hundred Eleven and 11/100ths Dollars (\$19,711.11), or a total sum of Fifty-three



Thousand, Four Hundred Thirty-five and 55/100ths Dollars (\$53,435.55).

Witness the Honorable A. M. Cristy, Judge of the above entitled Court this 20 day of April, 1934.

[Seal]

JOHN LEE KWAI

Clerk.

Let the foregoing Judgment be entered.

A. M. CRISTY

Second Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii. [91]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii

[Title of Cause.]

EXCEPTION TO JUDGMENT

[Endorsed]: Filed Apr. 20, 1934. [92]

Comes now Inter-Island Steam Navigation Company, Limited, defendant above named, and hereby excepts to the making and entry of the judgment herein upon the ground that said judgment in contrary to the law and the evidence.

Dated: Honolulu, T. H., April 20th, 1934.

SMITH, WARREN, STANLEY &  
VITOUSEK and

ROBERTSON & CASTLE,

By J. G. ANTHONY,

Attorneys for Defendant.

The foregoing exception is hereby allowed.

[Seal]

A. M. CRISTY

Presiding Judge [93]

## PLAINTIFF'S EXHIBIT A

## SCHEDULE "A"

## COMPARATIVE ANNUAL STATEMENT OF FEE

FOR YEARS ENDING DECEMBER 31, 1913 TO DECEMBER 31, 1922

## PUBLIC UTILITY CORPORATION

## GROUP "A" COMPANIES

Subject to Investigation

	For Year Ending 1913	For Year Ending 1914	For Year Ending 1915	For Year Ending 1916	For Year Ending 1917	For Year Ending 1918	For Year Ending 1919	For Year Ending 1920	For Year Ending 1921	For Year Ending 1922
Oahu Railway & Land Co.	\$1,550.05	\$3,216.88	\$3,206.62	\$3,261.66	\$3,295.48	\$3,474.42	\$3,500.16	\$3,586.20	\$4,107.64	\$3,986.00
Kahului Railroad Co.	188.13	354.66	375.92	408.00	410.66	432.08	419.38	515.34	656.54	494.00
Hawaii Consolidated Railway Co.	—	—	—	4,753.99	1,902.26	2,007.74	1,917.80	2,009.88	2,250.46	2,337.00
Hawaii Railway Co. Ltd.	51.75	106.86	106.20	123.12	103.34	119.78	94.38	128.60	148.04	142.00
Kauai Railway Co.	118.93	255.14	282.96	289.82	305.92	333.80	279.10	286.60	301.36	354.00
Koolau Railway Co.	38.95	72.58	75.44	74.38	78.66	75.66	74.80	80.40	85.70	87.00
Hilo Railroad Co.	779.70	947.17	—	—	—	—	—	—	—	—
Inter-Island Steam & Navigation Co.	1,201.81	2,248.32	2,231.48	2,270.10	2,693.64	2,917.90	3,053.22	3,158.70	3,512.00	3,285.00
Matson Navigation Co.	12.70	18.80	30.40	42.00	54.98	43.84	2.20	4.90	142.10	143.00
Mutual Telephone Co.	170.66	436.18	492.96	520.60	568.94	657.14	748.58	777.90	1,009.98	1,254.00
Maui Telephone Co.	25.46	45.00	47.28	45.94	53.42	58.82	63.04	65.60	80.26	107.00
Kauai Telephone Co.	9.70	18.36	19.92	20.32	21.38	26.88	24.56	26.10	38.63	43.00
Kohala Telephone Co.	5.07	10.34	9.96	10.06	9.74	11.62	9.82	12.44	—	—
Kona-Kau. Telephone Co.	10.07	18.36	—	—	—	—	—	—	—	—
Hamakua-So. Kohala Telephone Co.	8.70	14.98	—	—	—	—	—	—	—	—
Hilo-Hawaii Telephone Co.	22.91	97.60	112.84	115.68	125.52	136.48	139.00	147.70	190.30	220.00
Komokila Shipping Co.	—	—	12.40	—	—	—	—	—	—	—
Oahu Shipping Co.	—	10.00	72.22	82.86	69.32	105.86	85.50	79.60	108.12	—
Ahukini Terminal Rlwy Co.	—	—	—	—	—	—	—	—	—	248.00
<b>TOTALS—GROUP "A"</b>	<b>4,194.59</b>	<b>7,871.23</b>	<b>7,076.60</b>	<b>12,018.53</b>	<b>9,693.26</b>	<b>10,402.02</b>	<b>10,411.54</b>	<b>10,879.96</b>	<b>12,631.13</b>	<b>12,707.00</b>

## GROUP "B" COMPANIES

Subject to Complete Jurisdiction

Honolulu Gas Co. Ltd.	124.01	269.20	310.88	329.74	363.36	372.40	402.80	435.38	497.02	623.00
Hilo Gas Co. Ltd.	—	—	—	—	—	71.20	71.86	75.54	81.28	90.00
Honolulu Rapid Transit Co. Ltd.	520.24	1,095.24	1,085.84	1,069.58	1,295.92	1,526.60	1,533.14	1,580.94	1,661.34	1,760.00
Honolulu Motor Coach Co. Ltd.	—	—	—	—	—	—	—	—	—	—
Hawaiian Electric Co. Ltd.	287.04	619.36	735.72	777.20	830.82	847.80	968.20	1,283.50	1,448.74	2,050.00
Hilo Electric Co. Ltd.	83.99	177.42	180.90	189.50	185.18	234.08	240.30	207.50	224.32	340.00
Island Electric Co.	13.10	37.26	37.66	47.92	53.00	65.62	69.00	34.93	29.11	80.00
Maui Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	40.00
Interurban Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	—
Kapaa Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	—
Lahaina Ice Co. Ltd.	—	2.30	5.86	6.26	6.74	7.52	33.02	29.34	33.28	30.00
Hana Ice & Electric Co. Ltd.	—	—	—	—	—	—	9.46	12.80	14.36	10.00
Waipahu Ice & Electric Co.	—	1.00	2.02	1.86	2.02	10.38	6.44	11.60	—	—
Waiahi Electric Co. Ltd.	—	4.58	7.10	5.26	8.52	8.44	8.98	7.60	8.94	10.00
Waianae Garage & Electric Co. Ltd.	—	—	—	—	—	—	0.00	14.40	14.00	—

## F'S EXHIBIT A

69

## EDULE "A"

## ANNUAL STATEMENT OF FEES

1913 TO DECEMBER 31, 1930 INCLUSIVE

For Year Ending 1920	For Year Ending 1921	For Year Ending 1922	For Year Ending 1923	For Year Ending 1924	For Year Ending 1925	For Year Ending 1926	For Year Ending 1927	For Year Ending 1928	For Year Ending 1929	For Year Ending 1930	Totals for 18 Year Period
586.20	\$4,107.64	\$3,986.80	\$3,851.24	\$3,924.50	\$4,064.40	\$4,209.04	\$3,977.30	\$3,820.56	\$3,811.56	\$3,657.06	\$64,501.57
515.34	656.54	494.32	503.42	453.18	753.90	745.46	818.00	856.92	850.30	842.26	10,078.47
009.88	2,250.46	2,337.94	2,255.42	2,257.54	2,396.30	2,402.20	2,419.68	2,468.72	2,436.32	2,454.78	36,271.03
128.60	148.04	142.78	154.54	151.40	202.10	244.42	240.40	210.22	234.10	240.06	2,802.09
286.60	301.36	354.22	316.92	392.70	422.92	447.88	438.78	449.48	494.76	447.76	6,219.05
80.40	85.70	87.58	83.42	86.20	86.38	86.32	89.10	90.02	47.65	139.99	1,453.23
—	—	—	—	—	—	—	—	—	—	—	1,726.87
158.70	3,512.00	3,285.62	—	—	—	—	—	—	—	—	26,572.79
4.90	142.10	143.42	112.40	109.92	93.70	82.70	88.30	87.04	89.30	100.40	1,259.10
777.90	1,009.98	1,254.60	1,382.46	1,565.14	1,627.30	2,085.54	2,135.56	2,218.48	2,350.56	2,492.12	22,494.70
65.60	80.26	107.84	108.38	119.66	124.00	—	—	—	—	—	944.70
26.10	38.63	43.48	45.04	49.88	56.72	55.70	66.60	68.14	69.50	—	660.91
12.44	—	—	—	—	—	—	—	—	—	—	79.05
—	—	—	—	—	—	—	—	—	—	—	28.43
—	—	—	—	—	—	—	—	—	—	—	23.68
147.70	190.30	220.90	220.66	242.52	254.54	—	—	—	—	—	2,026.65
—	—	—	—	—	—	—	—	—	—	—	12.40
79.60	108.12	—	96.71	—	—	—	—	—	—	—	710.19
—	—	248.00	364.94	409.24	403.24	441.76	431.40	470.66	505.64	531.62	3,806.50
879.96	12,631.13	12,707.50	9,495.55	9,761.88	10,485.50	10,801.02	10,705.12	10,740.24	10,889.69	10,906.05	181,671.41
435.38	497.02	623.18	621.20	696.58	813.60	875.26	858.10	916.42	1,034.14	1,063.82	10,607.09
75.54	81.28	90.88	86.12	81.12	84.34	84.50	83.54	82.62	85.62	91.70	1,070.32
580.94	1,661.34	1,760.98	1,895.38	1,988.92	2,014.34	2,074.48	2,023.76	2,019.24	2,089.96	2,065.18	29,301.08
—	—	—	—	—	—	—	37.64	27.60	39.78	42.50	147.52
283.50	1,448.74	2,050.96	2,283.30	2,552.14	3,070.50	3,201.72	3,324.20	3,425.96	3,670.22	4,624.56	36,001.94
207.50	224.32	346.40	376.74	416.08	450.14	471.76	473.22	486.36	500.16	509.58	5,753.63
34.93	29.11	86.41	—	—	—	—	—	—	—	—	474.01
—	—	49.96	68.60	95.58	113.44	134.10	155.62	232.54	248.62	262.60	1,361.06
—	—	—	—	—	—	—	—	375.74	99.08	97.20	572.02
—	—	—	—	—	—	—	—	11.40	20.88	25.24	57.52
29.34	33.28	35.32	39.40	35.68	36.46	40.06	37.36	37.94	38.68	32.66	453.38
12.80	14.36	15.62	13.68	13.66	13.56	13.12	15.20	15.20	14.96	16.08	167.70
11.60	—	—	—	—	—	—	—	—	—	—	35.32
7.60	8.94	10.08	10.09	10.90	12.08	13.42	20.64	22.82	23.56	25.54	208.55



Koolau Railway Co.	30.30	42.30	40.44	41.00	40.00	40.00	41.00	41.00	41.00	41.00	41.00	41.00
Hilo Railroad Co.	779.70	947.17	—	—	—	—	—	—	—	—	—	—
Inter-Island Steam & Navigation Co.	1,201.81	2,248.32	2,231.48	2,270.10	2,693.64	2,917.90	3,053.22	3,158.70	3,512.00	3,285.62	—	—
Matson Navigation Co.	12.70	18.80	30.40	42.00	54.98	43.84	2.20	4.90	142.10	143.42	112.40	—
Mutual Telephone Co.	170.66	436.18	492.96	520.60	568.94	657.14	748.58	777.90	1,009.98	1,254.60	1,382.46	—
Maui Telephone Co.	25.46	45.00	47.28	45.94	53.42	58.82	63.04	65.60	80.26	107.84	108.38	—
Kauai Telephone Co.	9.70	18.36	19.92	20.32	21.88	26.88	24.56	26.10	38.63	43.48	45.04	—
Kohala Telephone Co.	5.07	10.34	9.96	10.06	9.74	11.62	9.82	12.44	—	—	—	—
Kona-Kau Telephone Co.	10.07	18.36	—	—	—	—	—	—	—	—	—	—
Hamakua-So. Kohala Telephone Co.	8.70	14.98	—	—	—	—	—	—	—	—	—	—
Hilo-Hawaii Telephone Co.	22.91	97.60	112.84	115.68	125.52	136.48	139.00	147.70	190.30	220.90	220.66	—
Komokila Shipping Co.	—	—	12.40	—	—	—	—	—	—	—	—	—
Oahu Shipping Co.	—	10.00	72.22	82.86	69.32	105.86	85.50	79.60	108.12	—	96.71	—
Ahukini Terminal Rlwy. Co.	—	—	—	—	—	—	—	—	—	248.00	364.94	—
<b>TOTALS—GROUP "A"</b>	<b>4,194.59</b>	<b>7,871.23</b>	<b>7,076.60</b>	<b>12,018.53</b>	<b>9,693.26</b>	<b>10,402.02</b>	<b>10,411.54</b>	<b>10,879.96</b>	<b>12,631.13</b>	<b>12,707.50</b>	<b>9,495.55</b>	<b>—</b>
<b>GROUP "B" COMPANIES</b>												
<b>Subject to Complete Jurisdiction</b>												
Honolulu Gas Co. Ltd.	124.01	269.20	310.88	329.74	363.36	372.40	402.80	435.38	497.02	623.18	621.20	—
Hilo Gas Co. Ltd.	—	—	—	—	—	71.20	71.86	75.54	81.28	90.88	86.12	—
Honolulu Rapid Transit Co. Ltd.	520.24	1,095.24	1,085.84	1,069.58	1,295.92	1,526.60	1,583.14	1,580.94	1,661.34	1,760.98	1,895.38	—
Honolulu Motor Coach Co. Ltd.	—	—	—	—	—	—	—	—	—	—	—	—
Hawaiian Electric Co. Ltd.	287.04	619.36	735.72	777.20	830.82	847.80	968.20	1,283.50	1,448.74	2,050.96	2,283.30	—
Hilo Electric Co. Ltd.	83.99	177.42	180.90	189.50	185.18	234.08	240.30	207.50	224.32	346.40	376.74	—
Island Electric Co.	13.10	37.26	37.66	47.92	53.00	65.62	69.00	34.93	29.11	86.41	—	—
Maui Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	19.96	68.60	—
Interurban Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	—	—	—
Kapaa Electric Co. Ltd.	—	—	—	—	—	—	—	—	—	—	—	—
Lahaina Ice Co. Ltd.	—	2.30	5.86	6.26	6.74	7.52	33.02	29.34	33.28	35.32	39.40	—
Hana Ice & Electric Co. Ltd.	—	—	—	—	—	—	9.46	12.80	14.36	15.62	13.68	—
Waipahu Ice & Electric Co.	—	1.00	2.02	1.86	2.02	10.38	6.44	11.60	—	—	—	—
Waiahi Electric Co. Ltd.	—	4.58	7.10	5.26	8.52	8.44	8.98	7.60	8.94	10.08	10.09	—
Waimea Garage & Electric Co. Ltd.	—	—	—	—	—	—	9.20	14.40	14.04	20.20	7.70	—
Kauai Light & Power Co.	—	—	—	—	—	—	—	—	—	—	—	—
Volcano Stables Co.	76.45	72.55	—	—	—	—	—	—	—	—	—	—
Waimea Stables Co.	—	—	—	—	—	—	35.10	38.80	89.50	93.08	88.00	—
Hilo Meat Co.	—	—	—	—	—	12.40	22.50	—	—	—	—	—
Kohala Ditch Co. Ltd.	—	—	—	—	—	—	—	1,540.28	107.55	107.55	364.21	—
Crowell, W. O.	—	—	—	2.92	2.10	—	—	—	—	—	—	—
Waiakea Improvement Co. Ltd.	—	—	—	—	—	—	—	—	—	—	15.84	—
<b>TOTALS—GROUP "B"</b>	<b>1,104.83</b>	<b>2,278.91</b>	<b>2,365.98</b>	<b>2,430.24</b>	<b>2,747.66</b>	<b>3,156.44</b>	<b>3,410.00</b>	<b>5,272.61</b>	<b>4,209.48</b>	<b>5,290.62</b>	<b>5,865.76</b>	<b>—</b>
<b>GRAND TOTALS</b>	<b>\$5,299.42</b>	<b>\$10,150.14</b>	<b>\$9,442.58</b>	<b>\$14,448.77</b>	<b>\$12,440.92</b>	<b>\$13,558.46</b>	<b>\$13,821.54</b>	<b>\$16,152.57</b>	<b>\$16,840.61</b>	<b>\$17,998.12</b>	<b>\$15,361.31</b>	<b>—</b>

[Endorsed]: Received in evidence 4-11-1933. D.M. Feder, Clerk.  
Filed July 10, 1934 at 9:15 o'clock A. M. Robert Parker, Jr. Clerk Supreme Court. [94]

80.40	85.10	87.58	83.42	86.20	86.38	86.32	89.10	90.02	47.65	139.99	6,219.05
—	—	—	—	—	—	—	—	—	—	—	1,453.23
158.70	3,512.00	3,285.62	—	—	—	—	—	—	—	—	1,726.87
4.90	142.10	143.42	112.40	109.92	93.70	82.70	88.30	87.04	89.30	100.40	26,572.79
777.90	1,009.98	1,254.60	1,382.46	1,565.14	1,627.30	2,085.54	2,135.56	2,218.48	2,350.56	2,492.12	1,259.10
65.60	80.26	107.84	108.38	119.66	124.00	—	—	—	—	—	22,494.70
26.10	38.63	43.48	45.04	49.88	56.72	55.70	66.60	68.14	69.50	—	944.70
12.44	—	—	—	—	—	—	—	—	—	—	660.91
—	—	—	—	—	—	—	—	—	—	—	79.05
—	—	—	—	—	—	—	—	—	—	—	28.43
147.70	190.30	220.90	220.66	242.52	254.54	—	—	—	—	—	23.68
—	—	—	—	—	—	—	—	—	—	—	2,026.85
79.60	108.12	—	96.71	—	—	—	—	—	—	—	12.40
—	—	248.00	364.94	409.24	403.24	441.76	431.40	470.66	505.64	531.62	710.19
879.96	12,631.13	12,707.50	9,495.55	9,761.88	10,485.50	10,801.02	10,705.12	10,740.24	10,889.69	10,906.05	3,806.50
—	—	—	—	—	—	—	—	—	—	—	181,671.41

435.38	497.02	623.18	621.20	696.58	813.60	875.26	858.10	916.42	1,034.14	1,063.82	10,607.09
75.54	81.28	90.88	86.12	81.12	84.34	84.50	83.54	82.62	85.62	91.70	1,070.32
80.94	1,601.34	1,760.98	1,895.38	1,988.92	2,014.34	2,074.48	2,023.76	2,019.24	2,089.96	2,065.18	29,301.08
—	—	—	—	—	—	—	37.64	27.60	39.78	42.50	147.52
83.50	1,448.74	2,050.96	2,283.30	2,552.14	3,070.50	3,201.72	3,324.20	3,425.96	3,670.22	4,624.56	36,001.94
207.50	224.32	346.40	376.74	416.08	450.14	471.76	473.22	486.36	500.16	509.58	5,753.63
34.93	29.11	86.41	—	—	—	—	—	—	—	—	474.01
—	—	49.96	68.60	95.58	113.44	134.10	155.62	232.54	248.62	262.60	1,361.06
—	—	—	—	—	—	—	—	375.74	99.08	97.20	572.02
29.34	33.28	35.32	39.40	35.68	36.46	40.06	37.36	37.94	38.68	32.66	453.38
12.80	14.36	15.62	13.68	13.66	13.56	13.12	15.20	15.20	14.96	16.08	167.70
11.60	—	—	—	—	—	—	—	—	—	—	35.32
7.60	8.94	10.08	10.09	10.90	12.08	13.42	20.64	22.82	23.56	25.54	208.55
14.40	14.04	20.20	7.70	8.62	7.12	9.32	10.62	11.16	12.58	23.20	148.16
—	—	—	—	—	—	—	—	—	—	8.16	8.16
38.80	89.50	93.08	88.00	87.52	98.60	106.48	105.66	121.98	153.24	109.42	149.00
—	—	—	—	—	—	—	—	—	—	—	1,127.38
40.28	107.55	107.55	364.21	373.24	120.74	364.80	252.90	266.84	280.52	267.42	34.90
—	—	—	—	—	—	—	—	—	—	—	4,046.05
—	—	—	15.84	7.48	7.18	7.42	7.62	7.56	8.48	7.60	5.02
—	—	—	—	—	—	—	—	—	—	—	69.18
2.61	4,209.48	5,290.62	5,865.76	6,367.52	6,842.10	7,396.44	7,406.08	8,061.38	8,320.48	9,272.46	91,798.99
2.57	\$16,840.61	\$17,998.12	\$15,361.31	\$16,129.40	\$17,327.60	\$18,197.46	\$18,111.20	\$18,801.62	\$19,210.17	\$20,178.51	\$273,470.40



PLAINTIFF'S EXHIBIT B  
STATEMENT SHOWING  
RECEIPTS AND DISBURSEMENTS  
EIGHTEEN YEAR PERIOD ENDING DECEMBER 31, 1930

Year Ending	Fees Received Schedule A	Legislative Appropriations	Interest and Miscellaneous Receipts	Total Receipts	Disburse- ments	Funds Encumbered a/c Contracts	Total Disbursements Encumbrances	Annual Balance	Accumulated Balance
1913	\$ 5,299.42	\$ 5,000.00	\$ —	\$ 10,299.42	\$ 5,237.15	\$ —	\$ 5,237.15	\$ 5,062.27	\$ 5,062.27
1914	10,150.14	—	—	10,150.14	6,868.19	—	6,868.19	3,281.95	8,344.22
1915	9,442.58	—	32.98	9,475.56	6,226.94	—	6,226.94	3,248.62	11,592.84
1916	14,448.77	—	276.92	14,725.69	16,854.83	—	16,854.83	2,129.14	9,463.70
1917	12,440.92	—	183.70	12,624.62	16,084.24	—	16,084.24	3,459.62	6,004.08
1918	13,558.46	—	149.60	13,708.06	9,602.02	—	9,602.02	4,106.04	10,110.12
1919	13,821.54	—	381.57	14,203.11	13,300.75	—	13,300.75	902.36	11,012.48
1920	16,152.57	5,000.00	174.87	21,327.44	27,184.32	—	27,184.32	5,856.88	5,155.60
1921	16,840.61	1,619.65	173.95	18,634.21	22,709.12	—	22,709.12	4,074.91	1,080.69
1922	17,998.12	4,720.61	139.90	22,858.63	14,947.68	—	14,947.68	7,910.95	8,991.64
1923	15,361.31	—	204.94	15,566.25	14,080.54	—	14,080.54	1,485.71	10,477.35
1924	16,129.40	—	209.28	16,338.68	24,639.22	—	24,639.22	8,300.54	2,176.81
1925	17,327.60	16,842.35	123.33	34,293.28	13,955.65	12,500.00*	26,455.65	7,837.63	10,014.44
1926	18,197.46	—	199.27	18,396.73	17,287.29	—	17,287.29	1,109.44	11,123.88
1927	18,111.20	—	257.51	18,368.71	14,686.59	—	14,686.59	3,682.12	14,806.00
1928	18,801.62	—	353.72	19,155.34	16,167.69	—	16,167.69	2,987.65	17,793.65
1929	19,210.17	5,000.00	404.25	24,614.42	17,855.79	5,000.00**	22,855.79	1,758.63	19,552.28
1930	20,178.51	—	419.01	20,597.52	22,390.71	—	22,390.71	1,793.19	17,759.09
Totals	\$273,470.40	\$ 38,182.61	\$ 3,684.80	\$315,337.81	\$280,078.72	\$ 17,500.00	\$297,578.72	\$ 17,759.09	\$ 17,759.09

\*Encumbered a/c contract for Engineering Services.

\*\*Encumbered 2/c contract for Legal Services.

[Endorsed]: Received in evidence 4/11 1933. D. M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. [95]

**PLAINTIFF'S EXHIBIT C**  
**ANALYSIS OF DISBURSEMENTS**  
**PUBLIC UTILITIES COMMISSION**  
**FOR YEARS 1916-1917**

FOR YEAR—1916	Inter- Island Co. Cases	Other Misc. Cases	Undistri- butable Expenses	Capital Expendi- tures	Total Disburse- ments
Attorneys Fees .....	—	—	919.43	—	919.43
Auditors Fees .....	800.00	1,935.10	—	—	2,735.10
Commissioners Salaries .....	970.00	2,330.00	—	—	3,300.00
Furniture & Fixtures .....	—	—	—	769.23	769.23
Interpreters & Witnesses .....	249.60	—	—	—	249.60
Library Expense .....	—	—	375.17	—	375.17
Office & Clerical Expense .....	—	445.90	3,393.73	—	3,839.63
Office Rent & Expense .....	—	—	1,485.30	—	1,485.30
Printing .....	66.60	1,401.40	—	—	1,468.00
Transcript Expense .....	579.71	355.21	—	—	934.92
Traveling Expense .....	71.30	707.15	—	—	778.45
<b>TOTALS</b> .....	<b>2,731.21</b>	<b>7,174.76</b>	<b>6,173.63</b>	<b>769.23</b>	<b>16,854.83</b>
<b>FOR YEAR—1917</b>					
Attorneys Fees .....	\$1,500.00	—	1,971.78	—	3,471.78
Auditors Fees .....	765.00	1,750.00	—	—	2,515.00
Commissioners Salaries .....	430.00	1,400.00	—	—	1,830.00
Furniture & Fixtures .....	—	—	—	165.50	165.50
Interpreters & Witnesses .....	35.50	—	—	—	35.50
Library Expense .....	—	—	374.07	—	374.07
Office & Clerical Expense .....	170.96	—	3,462.88	—	3,633.84
Office Rent & Expense .....	—	—	1,675.26	—	1,675.26
Printing .....	135.00	574.30	—	—	709.30
Transcript Expense .....	1,465.91	124.08	—	—	1,589.99
Traveling Expense .....	—	97.50	—	—	97.50
<b>TOTALS</b> .....	<b>\$4,502.37</b>	<b>3,945.88</b>	<b>7,483.99</b>	<b>165.50</b>	<b>16,097.74</b>
<b>GRAND TOTALS</b> .....	<b>\$7,239.58</b>	<b>11,120.64</b>	<b>13,657.62</b>	<b>934.73</b>	<b>32,952.57</b>

**SUMMARY**

Direct Expenses a/c I. I. S. N. Co. Case	\$ 7,239.58	39.43%
Direct Expenses a/c Other Cases	11,120.64	60.57%

Office Rent & Expense	—	—	1,485.30	—	1,485.30
Printing	66.60	1,401.40	—	—	1,468.00
Transcript Expense	579.71	355.21	—	—	934.92
Traveling Expense	71.30	707.15	—	—	778.45

TOTALS	2,731.21	7,174.76	6,173.63	769.23	16,854.83
--------	----------	----------	----------	--------	-----------

FOR YEAR—1917

Attorneys Fees	\$1,500.00	—	1,971.78	—	3,471.78
Auditors Fees	765.00	1,750.00	—	—	2,515.00
Commissioners Salaries	430.00	1,400.00	—	—	1,830.00
Furniture & Fixtures	—	—	—	165.50	165.50
Interpreters & Witnesses	35.50	—	—	—	35.50
Library Expense	—	—	374.07	—	374.07
Office & Clerical Expense	170.96	—	3,462.88	—	3,633.84
Office Rent & Expense	—	—	1,675.26	—	1,675.26
Printing	135.00	574.30	—	—	709.30
Transcript Expense	1,465.91	124.08	—	—	1,589.99
Traveling Expense	—	97.50	—	—	97.50

TOTALS	\$4,502.37	3,945.88	7,483.99	165.50	16,097.74
--------	------------	----------	----------	--------	-----------

GRAND TOTALS	\$7,239.58	11,120.64	13,657.62	934.73	32,952.57
--------------	------------	-----------	-----------	--------	-----------

SUMMARY

Direct Expenses a/c I. I. S. N. Co. Case	\$ 7,239.58	39.43%
Direct Expenses a/c Other Cases	11,120.64	60.57%
Total Direct Expenses a/c Cases	\$18,360.22	100%

	Direct Expenses	Indirect Expenses Percentage	Amount	Total Expenses
I. I. S. N. Co. Case	\$7,239.58	39.43%	5,385.20	12,624.78
Other Cases	11,120.64	60.57	8,272.42	19,393.06
Total Expenses	\$18,360.22	100%	13,657.62	32,017.84
Capital Expenditures				934.73
Total Disbursements				32,952.57

[Endorsed]: Received in evidence 5/5 1933. D.  
M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. [96]



**DEFENDANT'S EXHIBIT AA**  
**10 HAWAIIAN SUGAR CROPS, 1922-1931**  
 October 1, 1921, to September 30, 1931

72

(Compiled by Bureau of Labor and Statistics, Hawaiian Sugar Planters' Association)

HAWAII	1922 Tons	1923 Tons	1924 Tons	1925 Tons	1926 Tons	1927 Tons	1928 Tons	1929 Tons	1930 Tons	1931 Tons
Olaa Sugar Co., Ltd.	29,071	25,695	29,330	33,921	36,202	34,382	40,027	39,200	39,850	46,686
Waiakea Mill Co.	7,247	5,612	6,957	10,938	11,419	11,489	13,550	14,659	14,280	18,104
Hilo Sugar Co.	18,332	16,154	21,729	23,106	24,867	21,839	25,154	25,046	26,487	27,878
Hawaii Mill Co., Ltd.	1,725	1,639								
Kaiwiki Milling Co.	484	816	295							
Onomea Sugar Co.	22,884	18,475	21,430	27,776	25,794	23,829	24,927	28,470	25,146	29,749
Pepeekeo Sugar Co.	11,007	9,540	10,969	14,241	12,651	12,218	11,917	13,038	13,988	12,683
Honomu Sugar Co.	9,560	8,057	9,383	9,231	10,950	9,556	10,335	9,934	10,146	10,683
Hakalau Plantation Co.	18,471	13,990	16,023	17,861	19,466	19,382	19,590	17,687	18,576	19,217
Laupahoehoe Sugar Co.	14,520	9,339	14,199	14,808	13,862	16,925	16,471	16,754	16,533	19,388
Kaiwiki Sugar Co., Ltd.	6,940	5,286	7,102	7,688	7,940	8,506	10,177	9,624	8,395	10,351
Hamakua Mill Co.	11,675	8,183	14,533	14,241	13,938	12,800	13,937	14,058	8,993	15,144
Paaupah Sugar Plantation Co.	11,092	9,743	9,623	12,274	13,699	11,643	13,545	12,227	11,197	13,776
Honokaa Sugar Co.	8,535	7,391	8,565	9,492	11,024	10,853	23,486	23,268	19,826	27,133
Pacific Sugar Mill	6,495	5,298	7,355	7,171	8,690	7,171				
Niulii Mill and Plantation	2,183	1,737	2,803	2,990	3,751	2,234	3,664	3,659	3,602	3,902
Halawa Plantation	2,501	2,369	2,860	3,295	3,211	2,241	3,213			
Kohala Sugar Co.	5,701	3,681	7,512	7,058	7,295	7,940	8,436	12,010	9,793	28,600
Union Mill Co.	3,363	2,003	5,170	4,029	6,300	3,517	5,983	5,326	4,363	7,505
Hawi Sugar Co., Ltd.	4,592	3,541	8,656	10,689	7,445	6,257	7,567	7,769	8,458	
Kona Development Co., Ltd.	3,137	2,714	1,457	2,121	1,836					
Hutchinson Sugar Plantation Co.	6,709	5,453	8,759	10,700	10,171	9,262	12,781	15,728	13,199	12,832
Hawaiian Agricultural Co.	18,699	18,643	17,001	19,793	20,786	21,242	26,674	31,040	29,630	27,124
Wailea Milling Co.	3,341	2,592	2,958	4,960	3,553	6,214	4,309	5,541	4,467	6,005
Crescent City Milling Co., Ltd.				742						
Homestead Plantation Co., Ltd.					2,316	1,537	2,334	2,427	2,121	
Puakea Plantation Co., Ltd.	720	411	899		1,693	934	1,546	1,568	1,281	
	228,994	188,362	235,568	269,125	278,852	261,971	299,623	308,132	290,331	336,760
<b>MAUI</b>										
Pioneer Mill Co., Ltd.	26,240	28,733	34,981	35,395	28,378	38,891	44,461	45,363	46,393	47,039
Olowalu Co.	1,741	1,888	2,289	2,065	2,262	2,437	2,588	2,728	2,967	2,969
Wailuku Sugar Co.	14,167	15,447	18,029	17,881	17,466	19,988	22,011	20,947	18,247	20,356
Hawaiian Coml. & Sugar Co.	51,000	44,050	63,258	67,726	63,555	63,518	71,720	74,697	72,500	77,050
Maui Agricultural Co.	25,326	20,043	32,249	40,711	41,675	41,920	45,326	48,503	46,015	43,253
Kaeleku Plantation Co., Ltd.	3,972	2,421	4,558	6,026	5,614	5,289	6,007	6,062	5,352	5,239
Kipahulu Sugar Co.	1,401	487								
Haiku Fruit & Packing Corp.				190						
	193,847	112,069	155,364	169,904	158,950	172,043	192,113	198,300	191,474	201,906

Olowalu Co.	1,741	1,888	2,289	2,065	2,262	2,437	2,588	2,728	2,967	2,969
Wailuku Sugar Co.	14,167	15,447	18,029	17,881	17,466	19,988	22,011	20,947	18,247	20,356
Hawaiian Coml. & Sugar Co.	51,000	44,050	63,258	67,726	63,555	63,518	71,720	74,697	72,500	77,050
Maui Agricultural Co.	25,326	20,043	32,249	40,711	41,675	41,920	45,326	48,503	46,015	49,253
Kaeleku Plantation Co., Ltd.	3,972	2,421	4,558	6,026	5,614	5,289	6,007	6,062	5,352	5,239
Kipahulu Sugar Co.	1,401	487	—	—	—	—	—	—	—	—
Haiku Fruit & Packing Corp.	—	—	—	190	—	—	—	—	—	—
	123,847	113,069	155,364	169,994	158,950	172,043	192,113	198,300	191,474	201,906
<b>OAHU</b>										
Honolulu Plantation Co.	17,491	16,187	21,315	23,915	28,547	32,671	36,552	30,810°	33,241°	30,618°
Oahu Sugar Co., Ltd.	47,756	46,220	58,917	64,030	62,391	65,417	74,643	70,136	72,879	72,993
Ewa Plantation Co.	39,208°	38,896	46,315	50,826	51,361	50,518	54,369	50,806	52,158	54,003°
Apokaa Sugar Co., Ltd.	699	1,401°	907	1,136	979	1,145	1,091	1,355	1,018	1,307
Waianae Co.	5,330	5,609	5,704	6,820	4,520	5,014	5,709	5,965	7,209	6,773
Waialua Agricultural Co., Ltd.	30,594°	27,933°	36,001	32,585	43,601	45,161	50,386	54,924	53,117	52,123
Kahuku Plantation Co.	7,550°	6,515°	9,037	11,220	10,440	12,447	12,574	11,386	14,925	20,073
Laie Plantation	1,551	1,574	1,870	1,886	3,610	3,032	4,078	3,249	4,788	—
Koolau Agricultural Co., Ltd.	1,121	1,398	1,399	1,552	—	—	—	—	—	—
Waimanalo Sugar Co.	2,477	2,290	7,067	8,178°	7,949	8,241°	9,548	8,324°	8,817°	10,320°
Hawaiian Pineapple Co., Ltd.	—	—	—	89	139	130	119	—	—	—
California Packing Corp.	—	—	—	223	168	222	—	—	—	—
	153,777	147,663	188,532	202,460	213,705	224,004	249,069	236,955	248,152	248,510
<b>KAUAI</b>										
Lihue Plantation Co., Ltd.	14,421	13,670	18,531	22,434	22,934	29,781°	28,354	29,391	36,507	37,079
Grove Farm Co., Ltd.	4,069	4,140	5,897	4,755	5,265	6,067	5,949	6,079	7,645	8,241
Koloa Sugar Co., The	5,380	6,089	9,550	11,199	10,353	11,812°	13,381	13,123	16,013	17,256
McBryde Sugar Co., Ltd.	14,149	11,822	15,186	18,360	16,218	16,457	20,120	20,075	22,192	24,694
Hawaiian Sugar Co.	18,741	18,874	24,541	24,856	25,339	25,990	26,878	30,349	31,819	34,010
Gay & Robinson	4,337°	5,454	4,256	3,86	4,937	4,260	4,642	5,031	5,240	5,175
Waimea Sugar Mill Co., The	2,111	2,198	2,198	2,924	2,605	2,632	3,066	2,827	3,172	3,281
Kekaha Sugar Co., Ltd.	18,898	16,015	18,495	19,535	22,179	28,710	20,770	33,503	35,757	42,603
Kilauea Sugar Plantation Co.	4,003°	3,711°	5,219°	6,280°	6,279°	6,712°	6,642°	6,801°	7,430°	8,132°
Makee Sugar Co.	14,959	12,872	16,641	18,597	18,151	19,008°	22,190	20,707	25,207	23,568
Kipu Plantation	1,431	1,692	1,455	1,692	1,479	1,886	2,243	2,397	2,624	2,572
	102,499	96,512	121,969	134,493	135,739	153,315	163,235	170,283	194,506	206,611
<b>HAWAII</b>										
HAWAII	228,954	188,362	235,568	269,125	278,852	261,971	299,623	308,132	120,331	336,760
MAUI	123,847	113,069	155,364	169,994	158,950	172,043	192,113	198,300	191,474	201,906
OAHU	155,777	147,663	188,532	202,460	213,705	224,004	249,069	236,955	248,152	248,510
KAUAI	102,499	96,512	121,969	134,493	135,739	153,315	163,235	170,283	194,506	206,611
Totals	609,077	545,606	701,433	776,072	787,246	811,333	904,040	913,670	924,463	993,787

2,000 pounds to the ton.

°Harvesting of crop not completed Sept. 30th.

Note:—Tonnage shown above for some plantations includes amounts of sugar belonging to independent planters.

[Endorsed]: Filed Jan. 9/34. D. M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker, Jr. Clerk Supreme Court. [97]





## DEFENDANT'S EXHIBIT BB

## INTER-ISLAND STEAM NAVIGATION CO., LTD.

SEGREGATION OF CERTAIN REVENUES INCLUDED IN VESSEL  
GROSS REVENUES FOR THE YEARS 1922 to 1929

	Vessel Revenues Gross (Excl. Tugs & Barges)	Sugar Freight for Transshipment to Mainland	U. S. Mail Revenue	Other U. S. Government Accounts	Total Sugar and U. S. Accounts	Percentage of Sugar and U. S. Accts. to Total Rev.
1922	1,868,998.	294,171.	68,724.	10,000.	372,895.	20%
1923	2,027,562.	285,588.	70,098.	10,000.	365,686.	18%
1924	2,171,855.	278,312.	70,098.	11,767.	360,177.	17%
1925	2,132,292.	300,009.	70,098.	16,118.	386,225.	18%
1926	2,262,221.	297,240.	85,299.	24,045.	406,584.	18%
1927	2,469,149.	306,648.	100,499.	31,288.	438,435.	18%
1928	2,578,880.	345,129.	100,480.	45,237.	490,846.	19%
1929	2,703,182.	332,205.	99,599.	38,765.	470,569.	17%
	<u>\$18,214,139.</u>	<u>2,439,302.</u>	<u>664,895.</u>	<u>187,220.</u>	<u>3,291,417.</u>	<u>18%</u>
		13%	4%	1%	18%	

[Endorsed]: Filed Jan. 9/34. D. M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker,  
Jr. Clerk Supreme Court. [98]

*Inter-Island etc. Co., Ltd.*

## DEFENDANT'S EXHIBIT CC

INTER-ISLAND STEAM NAVIGATION CO., LTD.  
 SEGREGATION OF GROSS REVENUES AS BETWEEN  
 PASSENGER, FREIGHT FOR THE YEARS 1922 to 1929

	Totals	Passenger Revenue	Freight Revenue	U. S. Mail Revenue	Miscellaneous Revenue
1922	1,868,998.	697,624.	1,078,517.	68,724.	24,133.
1923	2,027,562.	784,888.	1,167,230.	70,098.	5,346.
1924	2,171,855.	860,463.	1,235,313.	70,098.	5,981.
1925	2,132,292.	816,458.	1,234,624.	70,098.	11,112.
1926	2,262,221.	874,381.	1,293,035.	85,299.	9,506.
1927	2,469,149.	943,608.	1,404,079.	100,499.	20,963.
1928	2,578,880.	1,036,926.	1,425,373.	100,480.	16,101.
1929	2,703,182.	1,106,037.	1,483,388.	99,599.	14,158.
	18,214,139.	7,120,385.	10,321,559.	664,895.	107,300.

[Endorsed]: Filed Jan. 9/34. D. M. [redacted] der, Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker,  
 Jr. Clerk Supreme Court. [99]

DEFENDANT'S EXHIBIT DD  
YOUNG, LAMBERTON & PEARSON  
CERTIFIED PUBLIC ACCOUNTANTS  
CASTLE & COOKE BUILDING, HONOLULU, HAWAII

J. K. Lambertson, C. P. A.

P. O. Box 660

F. G. Pearson, C. P. A.

Cable Address

Members of the American

"Audits"

Institute of Accountants

Honolulu

Chartered Accountants (Scot.)

A. B. C. and Lieber Codes

INCOME AND PROPERTY TAXES PAID BY THE  
INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
TO THE TERRITORY OF HAWAII

Year	Income	Property	Total
1922	\$ 17,180.95	\$ 101,382.20	\$ 118,563.15
1923	30,240.95	108,233.17	138,474.12
1924	10,092.18	116,159.84	126,252.02
1925	12,781.24	115,786.06	128,567.30
1926	15,905.14	153,449.58	169,354.72
1927	45,566.10	153,186.67	198,752.77
1928	30,855.78	150,908.56	181,764.34
1929	32,880.23	173,479.90	206,360.13
1930	31,168.95	168,941.65	200,110.60
1931	25,540.03	184,126.24	209,666.27
1932	35,869.32	183,473.26	219,342.58
	<u>\$288,080.87</u>	<u>\$1,609,127.13</u>	<u>\$1,897,208.00</u>

We certify that the foregoing amounts were paid for income and property taxes to the Territory of Hawaii by the Inter-Island Steam Navigation Company, Limited during the eleven years ended December 31, 1932, and are in accordance with the records of that company.

[Seal] YOUNG, LAMBERTON & PEARSON  
Honolulu, Oahu, August 22, 1933. FGP. [101]

[Endorsed]: Recd. for identification 1/9 1934.  
D. M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker,  
Clerk Supreme Court [100]

**DEFENDANT'S EXHIBIT EE**  
**RECEIPTS FROM FREIGHT ON SUGAR BAGS**

	1935	1936	1937	1938	1939	Total
Honolulu to						
Hawaii	4300.	4,750.	4,100.	5,300.	5,750.	
Maui	6,422.	6,004.	6,536.	7,296.	7,524.	
Kauai	5,092.	5,130.	5,814.	6,194.	6,460.	
Total Freight	<u>\$15,814.</u>	<u>\$15,884.</u>	<u>\$16,450.</u>	<u>\$18,790.</u>	<u>\$19,734.</u>	<u>\$86,672.</u>

[Endorsed]: Received in evidence 1/9 1934. D. M. Feder, Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker, Jr. Clerk Supreme Court. [102]

Tuesday, April 11, 1933

At Term—2:00 p. m.

Present: Hon. A. M. Cristy, Second Judge, Presiding; D. M. Feder, Clerk; W. Chillingworth, Reporter.

[Title of Cause.]

**HEARING.**

Counsel: R. Cades, Esq., & U. E. Wild, Esq., (SWB) for Plaintiff. J. G. Anthony, Esq., (R&C) and W. L. Staley, Esq., (SWSV) for Defendant.

Counsel Cades made statement to the Court.

2:06 p. m. Counsel Cades called as a witness (1) Homer Eaton, who was duly sworn and gave testimony.

Plaintiff's Exhibit "A" for Identification: Carbon Copy Public Utility Corporation, Comparative Annual Statement of Fees for Years Ending Decem-



ber 31, 1913 to December 31, 1930 inclusive; received by the Court and marked as above.

Plaintiff's Exhibit "A": Statement formerly offered and received as Plaintiff's Exhibit "A" for Identification; received by the Court over objection of Counsel and marked as above.

Plaintiff's Exhibit "B": Carbon Copy Public Utility Corporation Statement Showing Receipts and Disbursements Eighteen Year Period Ending December 31, 1930; received by the Court over objection of Counsel and marked as above.

The Court stated that the above Exhibits—Plaintiff's Exhibit "A" and "B" were received subject to omissions and errors.

2:19 p. m. cross examination by Counsel Anthony.

[103]

2:34 p. m. Counsel for Plaintiff rested.

It was stipulated that subject to Mr. Wild's checking with his client and other auditors, it is agreed that the testimony of Mr. Eaton as to work done, was the only work done on behalf of the Commission in connection with the investigation of the books of the Inter-Island Steam Navigation Company, during the period as mentioned in the Complaint.

2:37 p. m. Counsel Stanley called as a witness (2) Frederick George Pearson, who was duly sworn and gave testimony.

No cross examination.

2:43 p. m. Counsel for Defendant rested, subject to whether or not the stipulation formerly made by Counsel today, and part of this record is withdrawn.

The Court instructed Counsel to file briefs; Counsel Anthony to file the opening brief in one week; and Counsel for Plaintiff given one week to reply, etc.

By the Court:

D. M. FEDER,

Clerk.

Monday, April 24, 1933

At Term: 3:00 p. m.

Present: The Court.

Counsel: Same.

#### FURTHER TRIAL.

3:00 p. m. Counsel Anthony recalled Mr. Eaton on further cross examination.

3:20 p. m. re-direct by Counsel Cades.

Counsel Cades made an offer of proof, whereupon Counsel Anthony withdrew his objection to the question put by Counsel Cades to the witness. [104]

3:50 p. m. the Court continued the above-entitled matter until 1:30 Friday, at which time Mr. Eaton would have certain Schedules prepared for Counsel.

By the Court:

D. M. FEDER,

Clerk.

Friday, April 28, 1933

At Term: 1:30 p. m.

By consent of Counsel the above-entitled matter was continued until Friday, May 5th at 2:00 p. m.

D. M. FEDER,

Clerk.

Friday, May 5, 1933

At Term: 2:00 p. m.

Present: The Court. (L. Finley, Reporter).

Counsel: Same.

#### FURTHER TRIAL.

Plaintiff's Exhibit "C": Analysis of Disbursements, Public Utilities Commission for years 1916-1917; received by the Court, subject to objection and exception of Counsel and marked as above.

2:00 p. m. Mr. H. Eaton was recalled on further re-direct examination by Counsel Cades.

Counsel Cades made an offer of proof. Counsel Stanley objected to the offer, which objection was sustained by the Court.

Counsel stipulated that after an investigation of the utilities of the Inter-Island started on motion of the Public Utilities Commission, complaints were made and amalgamated [105] with the hearing which was started on the initiation of the Commission.

Counsel Wild read into the record part of the Supreme Court record.

2:42 p. m. Counsel Anthony questioned Mr. Eaton.

2:57 p. m. the Court questioned the witness.

2:58 p. m. Further questioning by Counsel Anthony.

3:00 p. m. Counsel Wild questioned the witness.

3:01 p. m. Counsel Stanley questioned the witness.

3:08 p. m. Counsel rested.

The matter of continuance was left open.

By the Court:

D. M. FEDER,

Clerk.

Tuesday, January 9, 1934

At Term: 9:00 a. m.

Present: The Court. R. N. Linn, Reporter.

Counsel: Same.

#### FURTHER HEARING AMENDED ANSWER.

Counsel Cades presented a demurrer on the last Amended Answer.

Counsel Anthony made a statement objecting to the demurrer.

Counsel Cades made a statement to the Court, whereupon Counsel Anthony following with a statement outlining what he was going to show by the testimony to be taken.

Counsel Cades argued in favor of the demurrer above [106] mentioned, and objected to any evidence admitted in this cause at this time, tending to describe the character of gross receipts.

9:34 a. m. the Court took a recess.

9:38 a. m. the Court reconvened, whereupon Counsel Cades made a further statement. Counsel Anthony argued.

9:48 a. m. the Court took a recess.

9:59 a. m. the Court reconvened, whereupon Counsel Anthony further argued.

The Court overruled the objection of Counsel Cades, and allowed him an exception.

10:12 a. m. Counsel Anthony called as a witness (1) Stanley C. Kennedy, who was duly sworn and gave testimony.

10:17 a. m. Counsel Anthony called as a witness (2) John K. Clark, who was duly sworn and gave testimony; Mr. Kennedy being temporarily withdrawn as a witness, with permission of the Court.

10:25 a. m. the Court questioned the witness.

10:25 a. m. further direct.

10:25 a. m. cross examination.

10:28 a. m. redirect by Counsel Anthony.

Defendant's Exhibit AA: Statistics compiled by Bureau of Labor and Statistics—Hawaiian Sugar Planters Assn., showing tonnage produced from 1922-1931; received by the Court and marked.

10:34 a. m. recross examination.

10:35 a. m. Mr. Kennedy was recalled on further direct examination.

The Court questioned the witness.

10:59 a. m. further direct.

11:04 a. m. the Court took a recess. [107]

11:21 a. m. the Court reconvened, whereupon Mr. Kennedy was recalled on further direct by Counsel Anthony.



11:25 a. m. cross examination.

11:39 a. m. redirect by Counsel Anthony.

Counsel Anthony made an offer of proof to the effect that Defendant is under the Shipping Board and Federal Statutes, etc. Counsel Cades objected to the offer of proof, which objection was sustained by the Court and the offer denied. Counsel Anthony was allowed an exception.

11:45 a. m. further redirect by Counsel Anthony.

11:45 a. m. recross examination.

11:49 a. m. Counsel Anthony called as a witness (3).

Henry S. Turner, who was duly sworn and gave testimony.

Defendant's Exhibit BB: Inter-Island S. N. Co. Segregation of Certain Revenues included in Vessel Gross Revenues for years 1922 to 1929; received by the Court and marked.

Defendant's Exhibit CC: Inter-Island S. N. Co. Segregation of gross Revenues as between Passenger, Freight, for years 1922 to 1929; received by the Court and marked.

Defendant's Exhibit DD for Identification: Tabulation dated Aug. 22, 1933, prepared by Young, Lamberton & Pearson, of Income and Property Taxes paid by the Inter-Island S. N. Co., Ltd., to the Territory of Hawaii—1922-1932; received by the Court over objection of Counsel and marked.

Counsel Anthony made an offer to prove each and every allegation of paragraphs 3 and 7 of the Amended Answer. Counsel Cades objected to the offer. The Court sustained the objection, denied

the offer and allowed Counsel Anthony an exception.

12:07 p.m. the Court adjourned until 3:00 p.m.

3:00 p.m. It was stipulated that if witnesses were called, over objection of Counsel Cades, they would testify [108] as to certain matters relative to gross receipts, which said matters were read into the record by Counsel Cades.

Counsel Anthony offered to prove that Defendant is under the complete regulation of three Federal agencies. Counsel Cades objected. The Court sustained the objection, denied the offer and allowed Counsel Anthony an exception.

3:17 p.m. Counsel Anthony recalled Mr. Kennedy for further testimony.

It was stipulated by Counsel that the books of the Company show the same total as is on the exhibit now to be introduced.

Defendant's Exhibit "EE": Receipts from freight on sugar bags; received by the Court and marked.

The Court questioned the witness.

3:23 p.m. Counsel Cades questioned Mr. Kennedy.

3:23 p.m. Counsel Anthony called as a witness (4).

Mrs. Herbert Thomas Martin, who was duly sworn and gave testimony.

Counsel stipulated that Mr. Martin would testify in substance the same as Mr. Kennedy.

3:29 p.m. cross examination.

3:30 p.m. both Counsel rested, subject to checking the figures in the exhibits.

3:31 p.m. Counsel Cades moved to strike all the testimony in this present hearing for reasons given. It was agreed that memoranda be filed; Counsel Cades to file his, and Counsel Anthony to be given ten days to file his memo, after the filing of that of Counsel Cades.

3:37 p.m. the Court adjourned.

By the Court:

D. M. FEDER

Clerk [109]

---

Circuit Court, First Judicial Circuit  
Territory of Hawaii

[Title of Cause.]

### TRANSCRIPT OF TESTIMONY

[Endorsed]: Filed May 26, 1934. John Lee Kwai,  
Clerk.

[Endorsed]: Filed July 10, 1934. Robert Parker,  
Jr., Clerk Supreme Court. [110]

The above entitled cause came duly on for hearing before the Honorable A. M. Cristy, Second Judge of the above entitled court, on April 11th, 1933, Urban E. Wild, Esquire and J. Russell Cades, Esquire, of the firm of Smith, Wild & Beebe, appearing for the plaintiff, and J. Garner Anthony, Esquire of the firm of Robertson & Castle, and W. L. Stanley, Esquire of the firm of Smith, Warren, Stanley & Vitousek, appearing for the defendant, whereupon the following proceedings were had and testimony taken:

Mr. Cades: This is a proceeding to recover the statutory fees provided for under Section 2202 of the Revised Laws of Hawaii 1925. I would like to review briefly the history of the proceeding thus far so as to simplify this hearing. There was a demurrer filed to the complaint [112] setting out that the Public Utilities Commission had no jurisdiction over the defendant Inter Island Steam Navigation Company and that there was no authority in the Commission to collect those fees provided for in Section 2202.

The Trial Judge reserved three questions to the Supreme Court, the questions being: First, whether the Inter Island Steam Navigation Company was subject to investigation under the provisions of the Public Utilities Act; secondly, if they were subject to investigation, whether they were liable to pay the fees provided for under the statute; and, thirdly, whether the demurrer should be sustained upon any ground stated therein. In due time, the Supreme Court of the Territory of Hawaii rendered its opinion to the effect that the Inter Island Steam Navigation Company, Limited, was subject to investigation by the Public Utilities Commission of the Territory of Hawaii; that the defendant was liable by law to pay the fees set forth in Section 2202; and, further, that the demurrer to the complaint should be overruled. Thereafter, an answer was filed on behalf of the defendant again setting out that there was no jurisdiction in the Commission and further setting up that the fees claimed were unjust, arbitrary, excessive and unreasonable and

that they bear no reasonable relation to the cost of investigating the defendant's business and that therefore the tax received was arbitrary and in violation of the 5th and 14th amendments to the Constitution. Included in the stipulation of facts is the statement that no specific [113] services were rendered for this defendant during the years in question, to-wit: 1923 to 1930; stating further that during that time no accidents were reported by the defendant to the commission and that no complaint had been filed requiring investigation; and stating further that the defendant had at all times during this period contended that the Commission had no jurisdiction to investigate the company's affairs.

At this time, the only evidence that will be offered will be evidence that will go to demonstrate that fees are paid by all utility companies in the Territory of Hawaii situated in a similar position to the Inter Island Steam Navigation Company; and, secondly, the only other evidence that will be introduced is the amount of fees that have been collected and the amount of expenditures during those years. I should have said: from the inception of the Commission until 1931,—to the end of the period involved in this suit.

We will call Mr. Eaton to the stand.



**F. HOMER EATON,**

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

**Direct Examination**

Questions by J. Russell Cades Esquire:

Q. Your name, please.

A. F. Homer Eaton.

Q. And what is your occupation?

A. Auditor for the Public Utilities Commission.

[114]

Q. How long have you occupied that position?

A. Six and half years.

Q. As auditor of the Public Utilities Commission you have in your custody the control of the books and records of the Public Utilities Commission?

A. I do.

Q. Have you, from those books and records, at my request compiled a statement showing the total fees paid to the Commission during the years 1913 to 1930 inclusive?

A. I have.

Mr. Stanley: From what source?

Q. Does that statement show the source of all the revenue to the Commission?

A. It shows the fees derived and from what source they were received during the period 1913 to 1930 inclusive.

Q. Do you have that statement with you?

A. I have. (Handing counsel a document).

(Testimony of F. Homer Eaton.)

Mr. Cades: Your Honor, I would ask that this be marked for identification.

The Court: The document may be marked Plaintiff's Exhibit "A" for identification.

Mr. Wild: I understand that counsel is making no objection to the effect that it is not produced from the original record; but is going to object on grounds of law—incompetent, irrelevant and immaterial and all other grounds?

M. Stanley: Yes.

Q. Now, Mr. Eaton, I show you Plaintiff's Exhibit "A" for Identification and ask you whether or not that schedule is a true statement or true reflection of the books of the Commission showing the amount of fees paid by all companies either subject to investigation by the Commission or subject to the complete jurisdiction of the Commission?

A. That is an accurate transcript of it.

Q: I would ask you whether the group of companies called Group "A" are companies subject to investigation by the Public Utilities Commission in the Territory of Hawaii?

A. Yes.

Q. And Group "B" are companies who are investigated and regulated by the Public Utilities Commission?

A. Yes, that is correct.

Mr. Cades: I offer this in evidence.

Mr. Anthony: We object to the admission of this exhibit in evidence on the grounds: that it is in-

(Testimony of F. Homer Eaton.)

competent, irrelevant and immaterial; having no bearing on the issues raised under these pleadings to-wit: the question of whether or not these fees are reasonable and the question of whether or not they bear any reasonable relationship to the cost of investigation; and on the further ground that it is proven by the stipulation on file in this cause that no investigation was made by the Public Utilities Commission and no services were performed,—that is, of this defendant,—and no services were performed by the Commission on the behalf of the Inter Island Steam Navigation Company and the only thing that they did was to find out that was claimed to be owing under the statute; and on the further ground that what other companies [116] pay for other and different services has no bearing or relationship to what is reasonable for the Inter Island to pay for any services that were rendered for and on behalf of the Inter Island.

The Court: You are not objecting to the form in which it is offered but the substance of what is in the offer?

Mr. Anthony: Exactly. We would like to have the opportunity to check the figures. We are not making any objection on the ground that it is taken from other documents or that he does not know of his own knowledge but we are objecting to it on the ground that it shows fees paid by other companies,—and on the other grounds that I have stated.

(Testimony of F. Homer Eaton.)

The Court: The court at this time will overrule the objection and allow you an exception. In connection with this jury-waived matter, you will have full opportunity to argue that.

(Exception noted)

The Court: The document will be received and marked Plaintiff's Exhibit "A", subject to check for omissions and errors that may be discovered in the comparison. [Plaintiff's Exhibit A, here introduced is set forth in this printed transcript at page 69.]

Mr. Anthony: Was that letter offered in evidence or just the schedule.

Mr. Cades: The letter is just a letter of transmittal which contains a summary.

Mr. Anthony: What the Commission writes to their attorneys is immaterial. [117]

Mr. Cades: We have offered the letter.

Mr. Wild: I might say that we will hold the privilege of inspecting their records at any reasonable time.

The Court: The exhibit was received with that understanding. There are two schedules here.

Mr. Cades: I have only examined the witness on one. We will offer them separately.

Q. Mr. Eaton, did you prepare at my request from the books and records in your custody a statement showing the total of the receipts from all sources and the total of disbursements of the Commission from the year 1913 to 1930?

(Testimony of F. Homer Eaton.)

A. Yes.

Q. You have that statement with you?

A. Yes.

Q. (Handing witness a document) Is this a copy of that statement?

A. That is correct.

Mr. Cades: I now offer this in evidence.

Mr. Anthony: We object to the receipt of this document in evidence on the grounds, Your Honor, without repeating it.

The Court: The same ruling, exception allowed, —subject to correction for errors and omissions. This document may be marked Plaintiff's Exhibit "B".

[Plaintiff's Exhibit B, here introduced is set forth in this printed transcript at page 70.]

Q. Referring to Exhibit "A", Mr. Eaton, will you explain what each of the headings,—the divisions in Group A and [118] Group B means?

A. Group A compilation indicates companies over which the Commission has power of investigation and limited jurisdiction; whereas, Group B companies are companies where the Commission has complete jurisdiction; and there is a grand total showing the totals for each year for each group.

Mr. Stanley: We move that the answer be stricken as a conclusion of the witness as to the extent of the jurisdiction from the books, over the companies.



(Testimony of F. Homer Eaton.)

The Court: It is not controlling on the court; but what was the intention behind the compilation.

Mr. Stanley: That is not the question or answer.

The Court: That is the extent to which the answer goes, as far as the answer is concerned. The court will treat as surplusage what the witness adds. The court will disregard the explanation of his attempted compilation as simply the witness' idea.

Q. Now, referring to the first company listed in Group A: Oahu Railway & Land Company,—is that a railroad company operating between points entirely within the Territory of Hawaii?

A. That's correct.

Q. And your answer is the same for Kahului Railroad Company?

A. Yes.

Q. And for all the other railroads listed in that list?

A. There are one or two that have been discontinued or abandoned,—not operating in 1930; otherwise my answer would be the same. [119]

Q. For the time that they operated, they operated in the Territory of Hawaii?

A. Yes.

Q. The Mutual Telephone Company. Is the Mutual Telephone Company engaged in the transmission of information by wire between points in the Territory?

A. That's correct.

(Testimony of F. Homer Eaton.)

Q. And your answer is the same for all of the telephone companies listed here?

A. Yes, sir.

Q. Do you understand the nature of the business of the two shipping companies: Komokila and Oahu?

A. As to the Komokila I can't answer. They only operated in 1915. The Oahu Shipping Company used to make a run over to Waimanalo carrying freight. That was discontinued in 1923.

Mr. Cades: That is all.

Cross Examination

Questions by J. Garner Anthony Esquire:

Q. Mr. Eaton, when did you go with the Public Utilities Commission and when did you become auditor?

A. January 1, 1927.

Q. You are the active member of the Commission, are you not,—the acting branch of that Commission,—the executive member?

A. I am a staff member.

Q. You do all the work of the Commission?

A. Not all of it. I do the accounting and finishing end of it. [120]

Q. With respect to the Inter Island: you have been down to the Inter Island since you became employed as auditor of the Public Utilities Commission?

A. I have.

(Testimony of F. Homer Eaton.)

Q. On how many occasions?

A. To my knowledge, three occasions in six and a half years.

Q. The first occasion was when?

A. February 1st, 1927.

Q. That is just after you took office?

A. That is correct.

Q. And how long were you there at that time?

Mr. Cades: I would like to interpose an objection on the ground that it is incompetent, irrelevant and immaterial what time was spent there by Mr. Eaton as the auditor of the Commission or by and other member of the Commission in actual investigation during the period in question in this case. There has been a stipulation filed in this case in which it is stipulated that no actual investigations were made. Whether or not they were made or whether or not they were not made because of the defendant's contention is totally immaterial in this case. This is not a suit for services rendered, or reports made, or work performed. It is a specific kind of tax levied on utility companies, the purpose of which is to keep the Public Utilities a working body as an operating unit.

(Argument)

[121]

The Court: The objection will be overruled and the court will allow you an exception.

Q. How long were you there on the first occasion: February 1st, 1927?

(Testimony of F. Homer Eaton.)

A. I should say about a half an hour,—possibly forty minutes. To the best of my recollection, inside of an hour.

Q. That was just to check the annual gross receipts?

A. It consisted in examining the accounts in the general ledger and compiling the gross receipts for the period of years up to 1927.

Q. That was the period from 1922 to 1925 inclusive?

A. 1922 to 1925. Correct.

Q. That was from January 1st, 1922 to December 31st, 1925?

A. That's correct.

Q. And you say that took you about forty minutes?

A. I would say inside of the hour. That was quite a while ago. A short time, however.

Q. Now, on the second occasion: what was that? When was it that you went down there on the second occasion?

A. I would say about the first part of 1927. Pardon me, the first part of 1928.

Q. What was your purpose in going down there then? To get the gross receipts?

A. For the following year. To bring it up to date for one year. That is, bringing it up to 1926.

Q. To get the gross receipts and find out what the capital stock of the Inter Island was for the year 1926? [122]

(Testimony of F. Homer Eaton.)

A. Yes.

Q. How long were you down there on that occasion,—for that one year?

A. Half an hour.

Q. I believe you said that you were down there on a third occasion.

A. To bring it up to 1929. I think there was two other years.

Q. Do you recall when that was, Mr. Eaton,—just approximately?

A. No I can't. It would be some time in 1930.

Q. That is, after the report had come out for the calendar year 1929 you went down to make your computation of fees?

A. The reports of the Inter-Island you are speaking of?

Mr. Anthony: Yes.

A. We did not receive a report from the Inter-Island but we wanted to bring it up to 1929 and I went down there after the books had been closed and balance sheets drawn off and proper receipts filed to bring it up to the end of 1929.

Q. So, on the third occasion you completed your computation of fees claimed to be due under the gross receipts provision of the statute and the capital stock provision of the statute?

A. Yes.

Q. How long did that take you?

A. About the same time as the two prior occasions, probably.



(Testimony of F. Homer Eaton.)

Q. Those are the only times that you were down at the Inter-Island office? [123]

A. That's correct.

Q. And you were down there at the request of the Public Utilities Commission?

A. That's correct.

Q. Now, what books did you examine on those three occasions from which you got your figures?

Mr. Cades: My objection runs to this—

The Court: (Int.) Entire line, yes.

(Exception noted)

A. The general ledger of the company, the trial balance which is subsidiary record of the general books of account; and I believe I saw on one occasion the financial statement of the company for one period. I don't recall what period, however.

Q. Now, what information did you get from the general ledger?

A. It goes back a long ways.

Q. Did you get the gross receipts from the general ledger?

A. I can't answer that. I might have. I understand the gross receipts you generally carry them either in the trial balance or the general ledger but the subsidiary ledger tied up to the trial balance.

Q. And that same operation tied thru on each occasion you testified to?

A. Yes, that is correct.

(Testimony of F. Homer Eaton.)

Q. Now, on the occasion of your first visit you obtained figures covering the years January 1st, 1922 up to and including December 31, 1925. That is correct, is it not?

A. The statement I have here is computed up to 1926. It [124] may be that this has been typed since the 1925,—It is my recollection that they were first brought up to 1925. The first statement that was completed.

Mr. Stanley: That was from January 1st, 1922?

A. From January 1st, 1922,—for the years 1922, 1923, 1924 and 1925.

Q. At the time you took office as auditor, you did not have the figures for those particular years, I take it.

A. No. The records were not in the office.

Q. There were no records in the office of the Public Utilities Commission as to the years 1922 to 1925 inclusive?

A. That is correct. No records.

Q. Now, you sent the Inter Island a letter after that work was done, did you not?

A. A letter dated February 17, 1927. I have a copy of that letter here.

Q. And that contained the results of your investigation that you made,—the figures that you had obtained from the books?

A. That is correct.

Q. In the report of the Public Utilities Commission for December 31, 1927, there is reference to

(Testimony of F. Homer Eaton.)

an audit. An audit of the revenue accounts was made for the period January 1st, 1922, to December 31, 1925. That means what you have just testified to, does it not?

A. I don't quite understand the question. You say an audit or examination of what? [125]

Q. An audit of the Inter Island from January 1st, 1922, to December 31, 1925.

A. I have made no audit of the Inter Island.

Q. So, that statement is not correct: that an audit was made?

Mr. Cades: We object to that unless the statement is shown to him to let him identify it.

Mr. Stanley: What we are trying to find out is whether or not that refers to the work that you have testified to as having been done in the early part of 1927.

A. In answer to that, I'll have to state that those items are written by the secretary of the Commission and simply says "An audit has been made to ascertain the fees". I imagine that simply means the work I have described here.

Q. The work that you did yourself was the only work done in connection with the Inter Island during the years in question?

A. Yes. To the best of my knowledge, that is correct.

Mr. Anthony: That is all.

Mr. Cades: That is all. The plaintiff rests.

(Testimony of F. Homer Eaton.)

Mr. Anthony: I understand, subject to Mr. Wild's checking with his clients and their auditors, that it is agreed that the work that Mr. Eaton has testified to in connection with the examination of the books of the Inter Island was the only work done for and on the behalf of the Commission covering the period 1922 down to 1930,—during the period covered by the complaint.

Mr. Wild: In connection with the books?

Mr. Anthony: In connection with the books.

[126]

Mr. Wild: So stipulated.

Mr. Anthony: Mr. Pearson, will you take the stand, please.

FREDERICK GEORGE PEARSON,

a witness for the defendant, being first duly sworn,  
testified as follows:

Direct Examination

Questions by W. L. Stanley Esquire:

Q. Will you state your name, please?

A. Frederick George Pearson.

Q. You are a member of the partnership of Young, Lamberton and Pearson?

A. Yes.

Q. The partnership being composed of, yourself and John K. Lamberton?

A. Yes.

(Testimony of Frederick George Pearson.)

Q. The firm being composed, previous to December 10, 1932, of H. D. Young who is now deceased, and Mr. Lamberton and yourself?

A. Yes.

Q. This partnership is in what business?

A. Public accountants.

Q. State whether or not that firm,—or this firm,—the old one and the present one, have for a number of years last past been the auditors for the Inter Island Steam Navigation Company?

A. We have been their auditors for at least ten years.

Q. What particular member of that firm has done the [127] auditing of the books of the Inter Island?

A. I have.

Q. You are familiar with the books,—system of bookkeeping?

A. Yes.

Q. During the past ten years?

A. Past eight years.

Q. From 1922 on?

A. Yes.

Q. During the period covered in this suit,—1922 to 1930?

A. As far as I know.

Q. You are also familiar with the rate of compensation paid accountants in this Territory?

A. You mean doing public accountancy work as a firm?



(Testimony of Frederick George Pearson.)

Mr. Stanley: Yes, and individually.

A. I know of the rates.

Q. Now, you have heard the testimony given by Mr. Eaton here as to the work done by him in the examination of the books of the Inter Island Steam Navigation Company, Limited,—the general ledger, trial balance and subsidiary ledger,—on three occasions; first of all in January 1927 and again in April or the early part of 1928 and again in the early part of 1930, on which occasion he testified that on the first occasion he was engaged somewhere between a half an hour and forty minutes, the second occasion about a half an hour and the third occasion about a half an hour. What, in your opinion, using a liberal rate, would be fair compensation for the work I have indicated in auditing the books of the company referred to? [128]

A. For that work,—

Mr. Stanley: Covering the length of time testified to by Mr. Eaton.

Mr. Cades: I object to the question. They were—

The Court: (Int) If their theory is correct, the services are worth about fifteen dollars. The objection may be noted. The court, for the purposes of the record, will overrule it and will allow you an exception. I understand, the whole theory of the case is involved in that objection.

Q. Will you take up each of the services on each of the occasions or lump them all? We refer you to take them up separately.

(Testimony of Frederick George Pearson.)

A. A public accountant would probably charge at the rate of,—A qualified accountant would probably get a fee of thirty dollars a day. When it takes a broken day, he might render a bill pro rata. Probably for that, ten dollars would be due him for each time.

Q. For each occasion?

A. Yes. It would break up his half day.

Q. In your opinion, would that constitute reasonable compensation?

A. In my opinion that would constitute reasonable compensation.

Q. For an accountant performing the service described by Mr. Eaton?

A. Yes.

The Court: Would it make any difference if he made it [129] before half past eight in the morning so that he can have the rest of the morning to himself?

A. Yes.

Mr. Stanley: That is all.

Mr. Cades: That is all.

Mr. Stanley: We rest, subject, of course, to any change that might be necessary.

The Court: The question that is raised is a question of law that you will have to go up on any way. Do you want to reserve it?

Mr. Anthony: Let us go up on the record. I might say this: This particular question has never been before the Supreme Court: whether or not this fee

(Testimony of Frederick George Pearson.)

does have or does bear some reasonable relationship to the cost. I would like a genuine opportunity to be heard before the Court on that question.

The Court: Can you dictate it to your stenographer so that I can read it under some leisure of my own rather than under the pressure of listening to some oral statement of counsel. If you will talk out loud to your stenographer as if I were there and let me have the result.

Mr. Wild: When does Your Honor want briefs?

The Court: It depends on how much you like to talk,—whether two days apiece or a week apiece. I am not asking you to file Supreme Court briefs but a running account of your case and citations.

Mr. Wild: As far as the plaintiff is concerned; the [130] basis of the cause of action and all that has been furnished by the Supreme Court's decision, I would assume that there being nothing new brought up today, I would think that Mr. Anthony should file the opening brief and we answer.

The Court: You waive your opening and closing and let Mr. Anthony have the opening and closing?

Mr. Wild: I think that is all right. I really think that that is the situation.

Mr. Anthony: We do not admit for one moment that the burden is on the defendant and that this action has been foreclosed—

The Court: The point that counsel is taking: they do not know what in the world to argue about any more than what is in the Supreme Court decision;

(Testimony of Frederick George Pearson.)

and, in view of the fact that the point is a new point that you are raising in this proceeding, that perhaps a more satisfactory way would be to give us the benefit of your argument.

Mr. Wild: That is satisfactory.

Mr. Anthony: I should say about ten days.

The Court: It is up to you. Please don't consider it necessary to vamp and revamp like you would a Supreme Court brief. Talk out loud to the stenographer as if I were there and let me have the result.

(Adjourned).

[131]

---

2 o'Clock P. M.—April 24, 1933.

Appearance for Parties: Same as before.

Mr. Anthony: At the time that this Exhibit B for the plaintiff was offered, I did not cross examine Mr. Eaton on it. We reserved the right to examine the witness on it.

Mr. Wild: I do not understand that he reserved any leave.

The Court: He now asks for leave to examine on it.

**F. HOMER EATON,**

a witness for the plaintiff, resumed the stand.

**Cross Examination (resumed)**

Questions by J. Garner Anthony, Esquire:

Q. You have in your hand Exhibit B,—Exhibit A for the Plaintiff?

A. Exhibit A.

Q. That exhibit shows the receipts from various public utilities in the Territory of Hawaii, does it not, for the years 1913 to 1930 inclusive?

A. That's correct.

Q. On the left hand side of Exhibit A you have a heading "Group A, companies subject to investigation", in which there is this defendant. That is correct, is it not?

A. That's correct.

Q. Those companies are public utilities which you do not regulate as to rates or charges,—isn't that correct?

A. Since the year 1919 or 1920, after the passing of the Emergency Act, passed by Congress as a war measure. [132]

Q. That is, the Emergency Act you referred to—

A. (Int.) Transferring communication and transportation companies as well as the shipping companies to the United States Shipping Board.

Q. That was in what year?

A. I believe it was in 1917. I am not certain. That was prior to my connection with the Public Utilities Commission. I believe it was in 1917.



(Testimony of F. Homer Eaton.)

Q. And there has been no such legislation with respect to companies in Group B?

A. No.

Q. Did that change your duties in any way?

A. No.

Q. I hand you plaintiff's Exhibit "B", Plaintiff's Exhibit "B" is a summary of all receipts and disbursements of the Public Utilities Commission.

Is that correct?

A. From 1913 to 1930 inclusive.

Q. And it includes legislative appropriations made from time to time under the heading there "Legislative Appropriations"?

A. That's correct.

Q. Now, this item of "Miscellaneous Receipts": I suppose that is interest and like items?

A. It is practically all interest we receive from our funds in the Territorial Treasurer's Office. There are some small items of a minor nature in the nature of refunds. They are negligible, however.

[133]

Q. Funds encumbered by contracts. What does this item mean?

A. That \$12,500 in 1925 was an amount that was appropriated by the Territorial Legislature and was encumbered for engineering service in the valuation of three companies in the Territory: Maui Electric Company, Honolulu Gas Company and Hawaiian Electric Company.

(Testimony of F. Homer Eaton.)

Q. By encumbered you mean those funds are tied up by contract?

A. Tied up by contract. It means that it is so marked to that extent in the Territorial Auditor's books,—that it can be used only for the purpose indicated in the contract.

Q. And you similarly have a contract for that larger item of \$5,000?

A. That's correct.

Q. That is a fund encumbered on account of having a contract for legal services I see you have there. Is that correct?

A. That's correct.

Q. Is that for the purpose of bringing this action against the defendant?

A. I don't know whether I can answer that. It was for the purpose of legal services in connection with the Inter Island Steam Navigation Company.

Q. In connection with this suit, wasn't it?

A. If there was to be a suit brought. It was encumbered for any service to be rendered if there was a suit brought. [134]

Mr. Wild: There was an investigation first and an opinion received concerning the question of liability and this fund under contract covered those things plus any additional proceedings that might be taken. It did not require proceedings to be taken but it could only be used for legal services in connection with the Inter-Island matter.

A. That is as I understand it.

(Testimony of F. Homer Eaton.)

Q. Now, there was another item of \$2,500, isn't that correct, on account of legal services in this same case?

A. \$2,500 was paid as the initial payment out of our regular funds and disbursement made out of fees we received from utility companies.

Q. That was this case against the defendant?

A. Yes.

Q. And this \$5,000 indebtedness encumbered on account of contract for legal services, do I understand that all of that has not been paid?

A. That is correct.

Q. Only \$2,500 has been paid?

A. Yes.

Q. That is for and on account of this case against the defendant?

Mr. Stanley: For the purpose of the record, it is understood that the statement made by you may be incorporated in the record?

Mr. Wild: I made that statement so that it might save time, to be incorporated in the record.

[135]

Q. Mr. Eaton, calling your attention to the total disbursements on Exhibit B: from your knowledge of the activities of the Public Utilities Commission and from an examination of the records of the Commission, isn't it a fact that for the years 1922 to 1930 inclusive, over eighty per cent of the disbursements of this commission have been made in

(Testimony of F. Homer Eaton.)

connection with and on behalf of the corporations listed under Group B of Plaintiff's Exhibit A?

Mr. Anthony: We object to that as calling for the conclusion of the witness. They are all segregated. The percentage is merely a matter of mathematical computation.

The Court: The objection is overruled.

A. I would rather qualify my answer. I am not sure about the percentage. I would say, however, that from my experience with the Commission the larger portion of all disbursements have been made in connection with this Group B. As to whether it is eighty or 90 or 70 or 60 per cent I am not sure. The only way I could possibly make an accurate statement would be to analyze all disbursements since 1917,—1927.

Mr. Stanley: You mean 1917.

A. What I have been speaking of since I was on the Commission. I would have to make a thorough analysis of all the disbursements.

Q. Wouldn't you think it is a fair approximation to say that eighty per cent were for and on behalf of the companies listed in Group B?

A. I can't answer that. I don't know. I can answer it [136] this way: Since 1927, for the six and a half years that I have been on the Commission, the only work I have done with these companies here—

Q. (Int.) Where?

(Testimony of F. Homer Eaton.)

A. Group A,—was in two cases; one was the Kahului Railroad and the other was the Hauula Railroad.

Q. What did that work amount to?

A. That was quite a thorough analysis of each company. In the case of the Kahului Railroad, it was an analysis of the company from its inception in 1902, bringing it up to date for the purpose of rendering a report to the Inter State Commerce Commission in regard to an application of the Kahului Railroad Company for permission to issue stock dividends. We analyzed thoroughly all their accounts. Hauula was the same. With regard to the Hauula,—that should be Koolau Railway Company over in Hauula. In the case of Koolau they wanted to abandon their road. Some engineering features were drawn in there. It was a case of the company losing money and they wanted to abandon the road.

Q. Do you recall telling me that over eighty per cent of the disbursements made by the Public Utilities Commission was for the companies listed under Group B?

A. I do not recall telling you that. I recall you sitting in my office and saying "isn't it true that 80% was for Group A"—

Mr. Anthony: (Int.) Group B you mean. [137]

A. Group B. And I said "the only way that I could verify that would be to analyze all the disbursements". I remember the term "80%" was



(Testimony of F. Homer Eaton.)

used in my office. Whether I can say that that is correct, I don't know.

Q. How long would it take you to make an analysis?

A. Since 1913?

Mr. Anthony: No, since 1922.

A. Nine years analysis. I would say that it would probably take a week,—of every voucher,—for every cent of money expended by the Commission in nine years. We have probably seventy-five or a hundred vouchers a month. That would be twelve hundred vouchers a year.

The Court: Your answer, however, is that a majority of the expense incurred in connection with that is for companies listed in Group B?

A. I would say that the larger portion of the disbursements if allocated probably would be allocated to Group B.

Q. Would you say seventy-five per cent?

A. I would not attempt to use any per cent. If I started to using percentage, I would want to know what I am talking about. I don't know about that.

The Court: We have it at fifty-one per cent any way.

Q. What do you mean by majority? You were fairly definite the other day. You said over eighty per cent. I don't want you to go to a lot of work.

A. I would rather go to a lot of work rather than to give you a bad idea.

(Testimony of F. Homer Eaton.)

Q. What do you mean by majority. [138]

A. The majority portion would be anywhere from sixty to eighty per cent. Seventy-five per cent.

Q. As I understand your testimony now, Mr. Eaton, some place between sixty and eighty percent of the total disbursements of this Commission have been for and on account of the companies listed in Group B?

A. Since 1922.

Q. From 1922 to 1930 inclusive?

A. I would say about that. Somewhere in that range.

Q. That is a fair statement you would say?

A. Yes. There is a wide latitude there.

Q. Now, Mr. Eaton, with respect to the companies in Group B, the disbursements of the Commission have been in connection with valuations and regulation of the various companies and changes in their capital structure,—isn't that correct?

A. That is correct.

Q. Sometimes you would investigate companies on the other islands and there would be travelling expenses?

A. Yes, that's correct.

Q. Directing your attention to the companies in Group A: that is, Group A in Plaintiff's Exhibit "A": There has been no regulation as to rates or no valuations with respect to those companies since the years 1922 to 1930 inclusive, has there?

A. In respect to rates?

(Testimony of F. Homer Eaton.)

Mr. Anthony: Rates, yes.

A. No investigations with respect to rates.

Q. And the only investigation requiring the services of an auditor was the two you referred to, I take it; the Kahului [139] Railroad and the Koolau Railway?

A. That's correct.

Q. The servicing of these companies in Group A in Plaintiff's Exhibit "A" have consisted of what service for those companies?

A. Whose services,—mine?

Q. No; the service or work done by the Commission.

A. What's the question again?

Q. The services performed by the Public Utilities Commission in connection with those companies listed in Group A of Plaintiff's Exhibit A have been of what nature?

A. For the two companies that I have named, it was for the purpose of getting an analysis, in the case of the Kahului Railroad, of the business of that company relating to their application before the Inter-State Commerce Commission for stock dividend and in the case of the Koolau Railway, they wanted to abandon the road.

Q. How about the rest of them?

A. The rest of the companies: about the only service rendered by the Commission is in regard to accidents. Investigation of safety appliances or road and equipment. Investigation of any fatal accidents of any company.

(Testimony of F. Homer Eaton.)

Q. It is a fact that you do investigate fatal accidents?

A. Yes.

Q. As a rule, there is no investigation of any ordinary accidents?

A. Not of slight accidents. We consider it and the files are closed if it is slight. If it is serious we hold it in abeyance until the patient is discharged or died. [140]

Q. It is a fact that the services performed by the Commission with respect to those companies listed in Group A are comparatively of minor nature,—isn't that correct?

A. Yes.

Mr. Anthony: That is all.

### Redirect Examination

Questions by J. Russell Cades Esquire:

Q. Referring to this Plaintiff's B, first column, headed "Fees received, Schedule A": Do those fees refer to the statutory fees required to be paid by virtue of what is under Section 2202 of the Revised Laws of Hawaii?

A. Yes.

Q. In the third column, "Interest and miscellaneous receipts" are interest payments from the Territory and any other incidental receipts?

A. Minor refunds.

Mr. Stanley: What refunds? You might bring that out.

A. It may be a refund from an overpaid bill of some minor nature. A purchase the Commission may

(Testimony of F. Homer Eaton.)

have made and the next voucher refunded the money,—refund on account of overpayment on a purchase the Commission may have made.

Q. And the totals in the first column of Schedule B are the totals of the fees for the years as listed in Plaintiff's Exhibit "A"?

A. Yes.

Q. Now, there was an investigation of the affairs of the Inter Island Steam Navigation Company started in August and ended on September 4th, 1917 which finally ended in the de- [141] cision of the Supreme Court which is recorded in 24 Hawaiian Reports 136. I'll ask you whether you have ascertained the approximate expenses incurred by the Commission in carrying on that investigation referred to in that case?

Mr. Anthony: We object to that. There is no proper charge for investigation where they have no jurisdiction. They could add their own pay-roll. Anyhow, the court has allowed the table to go in over our objection as to the years anterior to 1921. We are only dealing with 1922 to 1930 and now counsel wants to bring out an investigation prior to 1922 over a subject matter this commission had no jurisdiction.

(Argument)

The Court: The objection has been noted. We had better have the argument later. The objection may be overruled and I'll show you an exception.



(Testimony of F. Homer Eaton.)

Mr. Anthony: This will take us into all kinds of ramifications. If we go into the cost of investigations to regulate rates which the Supreme Court says they had no right to do, we are going to get into all kinds of ramifications. I just want to point out what this will lead us to. It is not brought out on anything in the original examination.

(Further argument)

The Court: I will reverse my former order and will give an exception to counsel on the other side. I'll sustain the objection as to the matter being prior to the years 1922 to 1930.

Mr. Cades: At this time, Your Honor, I want to make an offer of proof. I offer to prove that during the years 1916 and 1917 an investigation was made in the affairs of [142] the Inter Island Steam Navigation Company instituted by virtue of complaints filed with the Commission—

Mr. Anthony: (Int) You offer to prove by this witness?

Mr. Cades: By this witness and other witnesses that may be adduced,—that the cost,—that the special cost to the Commission,—that the extraordinary cost to the Commission above ordinary expenses, was not less than eleven thousand dollars in connection with the investigation and in addition thereto, to properly ascertain the cost of the investigation, there must be added to the eleven thousand dollars some fair share of the cost of running the Commission including salaries and cost of the upkeep of the office.

(Testimony of F. Homer Eaton.)

The Court: Have you any objection to the offer?

Mr. Anthony: We do not believe that counsel can prove that statement and we accordingly withdraw our objection and let him proceed with his proof.

Mr. Cades: You withdraw your objection to the original question?

Mr. Anthony: Yes. It is understood that the whole case can be opened up anterior to 1922.

The Court: Any other questions that you raise, you will be given an opportunity to—

Mr. Stanley: (Int) I would suggest that if you are going into that whole question, the witness had better prepare those items.

Mr. Wild: We can do that,—and apportion it.

Mr. Cades: At this time, I would like to offer in evidence the record in the Supreme Court, Case No. 1050, being in [143] regard to the investigation referred to.

Mr. Anthony: You offer this volume?

Mr. Wild: No; the record.

Mr. Anthony: I think the court will take judicial notice of the decision.

Mr. Wild: We are offering the record.

The Court: I think you ought to call counsel's attention to the record itself and indicate what parts of the record you think are material.

Mr. Stanley: Sure. You can't offer the whole record. I have seen that record. That record consists of volumes of testimony and everything else. Surely that's not going to be offered in evidence.

(Remarks between the Court and Counsel)

(Testimony of F. Homer Eaton.)

Mr. Wild: If they are willing to stipulate the first statement in the Supreme Court: an application was filed with the Commission under which the Commission had to investigate. This was not a voluntary investigation by the Commission, was it? It was an investigation based upon the application, and with that stipulation——

Mr. Anthony: We don't know that. You ask us the question. We don't know.

Mr. Stanley: What does the decision show now?

Mr. Wild: I don't know whether you are asking me or I should inform you upon it. I am asking you to stipulate if you know that.

Mr. Cades: To stipulate as to the facts stated in the first paragraph of the decision of the Supreme Court. [144]

Mr. Wild: If you know those to be the facts, you can stipulate.

Mr. Stanley: The matter came up so long ago, I have no recollection how it came up. We are not in a position to stipulate to it.

Mr. Anthony: It is already in the record that no complaint was made against the Inter Island.

Mr. Wild: The years in dispute but not the prior years.

Mr. Stanley: We do not want the whole record to go in.

Mr. Wild: We have no objection to furnishing you with that table and give you time to make your computation.

(Testimony of F. Homer Eaton.)

Mr. Cades: We contend that as a matter of law or will contend that it is immaterial entirely what the cost of making the investigations are of this company or any other company.

The Court: I suggest that you utilize tomorrow afternoon to find out what in the record you want to offer as material to your offer and meet at 1:30 tomorrow.

Mr. Wild: Mr. Eaton says it will take him a week to get out the table. We can in the meantime stipulate as to the facts.

Mr. Stanley: The simplest way would be to have an analysis made of those disbursements.

The Court: Do you want to continue the matter until 1:30 when?

Mr. Wild: If we can stipulate on those things and they can go in subject to your right to cross-examine, then we can close the hearing, putting in those two stipulations. [145]

The Court: It would be better to have it continued to a certain date.

Mr. Anthony: Does Mr. Eaton know what he is to make?

Mr. Wild: You are supposed to make a complete segregation of expenses for all those companies. Say that you came up here with the statement that ten per cent of the funds have been expended on behalf of Group A.

Mr. Eaton: I can't do that.

Mr. Anthony: We only want it for the Inter Island.

(Testimony of F. Homer Eaton.)

Mr. Wild: I am perfectly willing to accept that same general statement as to the cost,—as already stated it is between 60% and 80%.

The Court: I think from the way the matter lies, put the burden upon the Utilities Commission to go further if they care to to show what the substantial proportion of the expense was. The requirement that the witness take time to segregate the expenditure upon which to base a percentage is a requirement that would serve no material purpose unless the Utilities Commission desires to show as has already been indicated 60% to 80% to Group A and 20% to 40% to Group B.

Mr. Anthony: That covers the entire period from 1913 to 1930?

Mr. Eaton: No, no. 1922 to 1930.

The Court: So that I may understand: the only point we are waiting on is, if you desire to have him get an accurate statement of the expenditures for this investigation then you have got to get it out. If you are [146] satisfied to give approximations as to that plus the offer of counsel would be sufficient.

Mr. Wild: He can give a rough estimation right now. All I am asking you to state is whether that is in the record. If so, we can stipulate it, just as you asked me to stipulate that we had no other request, subject to the right to go out and investigate. We investigated and it was all right. I am asking you to make the same sort of a stipulation. We can go up and look at the record.



(Testimony of F. Homer Eaton.)

Mr. Anthony: We can go up right now.

Mr. Wild: It is almost four.

Mr. Anthony: Why can't we check it on the record and come back here?

Mr. Wild: All right. Now, we have an approximation of the expense.

Mr. Eaton (the witness): The statement I can make in that respect is this: The expenses of the Commission for those two years was about twelve thousand dollars more than any other year. The investigation of those two years was the Inter Island. What proportion of the twelve thousand is chargeable to the Inter Island I can not state without going into the accounts.

Mr. Anthony: What were the others?

A. Hilo Electric and Mutual Telephone and Hilo Gas.

Mr. Wild: Just a rough approximation, if you can make it.

A. I can't make that except that that was the major investigation during the year. I have attempted to learn from the previous auditors,—this was before my time,—I [147] attempted to make an investigation from the previous auditors but they are unable to tell me. I don't know how I can.

The Court: Adjourn court until next Friday afternoon.

(Adjourned)

(Testimony of F. Homer Eaton.)

2 o'clock P. M., May 5, 1933.

The Court: This is a further hearing in Law 12809. Further testimony of F. Homer Eaton. He has already been sworn as a witness.

**F. HOMER EATON (Resumed)**

called as a witness on behalf of plaintiff, having been previously sworn, testified further as follows:

**Redirect Examination.**

By Mr. Cades:

Q. Mr. Eaton, have you prepared a statement showing the analysis of disbursements in conducting the investigation of the Inter-Island Steam Navigation Company, Limited, during the years 1916 and 1917?

A. I have.

Q. Do you have that statement with you?

A. I have the original.

Q. Will you produce it? (Witness produces paper.)

Q. I shall ask you whether—

Mr. Stanley. This is objected to on the ground it is absolutely immaterial and irrelevant. It was after the investigation, an investigation your honor, which was without the jurisdiction of the Public Utilities Commission, and that action of the utilities commission was reserved by the supreme court.

Mr. Wild. We furnished a copy of this statement to counsel some two or three days ago.

Mr. Stanley. The day before yesterday.

(Testimony of F. Homer Eaton.)

Mr. Cades. Q. Will you state what the total figure was for making that investigation?

A. For the year 1916, expenses that are directly applicable to the Inter-Island investigation, \$2737.21. For the year 1917, expenses directly applicable are \$4502.37, a total of \$7239.58. [149]

Q. Besides those expenses you say are directly applicable, were there not other expenses incurred because of that investigation?

A. There were other expenses that can not be allocated to any one particular case or investigation. On this particular schedule is shown as undistributable expenses \$13,657.62 for the 2-year period.

Q. In your summary you have allocated the \$13,657.62 on a percentage basis in part to the Inter-Island-company case and in part to other cases. Will you state upon what basis that allocation was made?

A. Yes, there was a total of \$18,360.22 in expenses for the two years that could be earmarked to special investigations, \$7239—

Mr. Stanley. Would it help your honor if your honor had a copy of that summary before you.

Mr. Wild. May we introduce the exhibit in evidence, subject to objection?

Mr. Anthony. We object to it on the further ground it involves years not in controversy.

Mr. Wild. We will stipulate you may make any objection you desire to make at the time you sub-

(Testimony of F. Homer Eaton.)

mit your brief. (Exhibit C marked and received in evidence and made a part hereof.)

[Plaintiff's Exhibit C, here introduced is set forth in this printed transcript at page 71.]

A. —\$7239.58 attributable to the Inter-Island case, and \$11,120.64 represents expenses for other cases. The allocation of this undistributable expense was made at the ratio the Inter-Island case bore to the total, which represents 39-odd percent, and the other cases 60-odd percent. That appeared on the undistributable expense as \$5385.20 applicable to the Inter-Island, which gives a total expense of \$1264.78 for the two years.

Mr. Cades. Q. Have you computed what the allocation of the undistributable expenses should be on the basis of the number of hearings held in connection with the Inter-Island?

A. Yes. [150]

Q. —compared to the number of hearings held in connection with other companies?

Mr. Stanley. That does not appear on this statement?

A. No.

Mr. Cades. Q. That basis of allocation does not appear on the statement?

A. No.

Q. Will you state the number of hearings in connection with the Inter-Island, and the total number of hearings held during the 2-year period?

(Testimony of F. Homer Eaton.)

A. The total number of hearings held in the 2-year period was 75, 51 for the Inter-Island and 24 for other utilities, the percentage of which would be 68 for the Inter-Island and 32 for other investigations.

Q. If the undistributable expense were allocated on that basis, what would be the total figure for the Inter-Island Steam Navigation Company case?

A. \$16,526.76.

Q. Now one further question: Mr. Eaton, from your experience in connection with the work of the Public Utilities Commission, can you form, have you been able to form an estimate of what the minimum cost of making an investigation generally of the Inter-Island Steam Navigation Company would be?

Mr. Anthony. If your honor please, we object to that, that has no relevancy to any issue here. As I understand the purpose of this testimony, it is introduced in an endeavor to show that these fees are reasonable fees for the years in question.

Your honor has ruled, overruling our objection, that [151] counsel may go into work done during years other than the years in question, the nine years with which we are concerned; and further, that as evidence of what work might have been done, they may go into the question of work actually done by the commission on what later turns out to be a void and unconstitutional proceeding.

Now we are asked to go a step farther and have this witness—I do not know what the basis of his



(Testimony of F. Homer Eaton.)

guess is going to be—make some estimate, some guess, as to what the cost of an investigation would be.

I submit there is no basis for this in evidence, there is no basis under the present theory under which the evidence is offered for allowing any such testimony.

The fact of the matter remains that no investigation was made of the Inter-Island, no services were performed for the Inter-Island except the \$30 about which this witness testified. No complaints have ever been registered against this defendant according to the stipulation on file.

Mr. Cades. Your honor, we submit if there were any merit in the contention of counsel at all that the fees, the taxes that are attempted to be collected in this proceeding must bear some relation to the value of the services performed by counsel for defendants, for the defendants—and we deny there is any merit in that contention—but the issue in this hearing has been restricted to that, and the only way this court may get any idea as to whether the fee is reasonable or not is by getting some idea of the scope of the commission's activities.

Here is a revolving fund which is used from time to time as complaints appear, for the purpose of carrying out [152] the provisions of a specific chapter. I submit this court is entitled to know, as well as any appeal court, whether upon such investigation of the Inter-Island's affairs, the investiga-

(Testimony of F. Homer Eaton.)

tions cost \$2 or \$5 or \$10,000; some minimum figure that this witness is capable of stating to this court, a minimum figure of expense that would have to be incurred in hearing upon a complaint filed, even though—

Mr. Stanley. Irrespective of the nature of the complaint, Mr.—?

Mr. Cades. That might be brought out by the evidence. I have not made any offer of evidence, I have just made a specific objection.

Mr. Anthony. Your honor, the evidence sought to be introduced is so remote it can have no probative force. It is not restricted to anything this commission has done, either for the Inter-Island or for the public. It is not restricted to any hearing and I submit it is not material under any issue of this case.

Counsel contended in the appellate court this was an inspection fee. If that is true the only question before this court is, is this fee that is sought to be collected here a reasonable inspection fee. What my brother on the other side is trying to bring into evidence is something to the effect that "What we might have expended if in fact we had done something." That of course, is not an issue before the court. The issue before the court is whether or not they have done anything. I submit the evidence is totally immaterial.

The Court. I am inclined to agree with objecting [153] counsel on that. It will not help the court on

(Testimony of F. Homer Eaton.)

the theory of the Inter-Island, nor would it be at all material. In other words it would be wholly immaterial if the proper theory is that it has no relation, and is not meant to have any relation to the actual expenditure. If the theory be it is something that would have to be related to expenditures, the evidence is that there was no expenditure during those years and therefore we are entering a realm of pure conjecture. It is further based upon pure conjecture as to any question of services, and so forth.

Mr. Cades. May I be heard further?

Mr. Wild. Just make an offer of proof.

Mr. Cades. At this time then your honor, I offer to prove by this witness that a general investigation into the affairs of the Inter-Island Steam Navigation Company, for the purpose of establishing a rate base from which the reasonableness of its rates could be ascertained, would cost the commission a minimum of \$10,000.

Aside from the offer of proof, I want to state that the purpose of this evidence, on Mr. Anthony's statement, appears to be material. Here is a fund, a revolving fund, held by the commission. If Mr. Anthony's theory is correct, if no fees were paid into that fund by any of these companies so that the commission was not in a position to make any investigations, then no suits of any kind would lie until they could first show as a condition precedent, that services had been performed.

(Testimony of F. Homer Eaton.)

It appears that the scope of the commissioner's activities is very largely circumscribed by the amount of money it has on hand at any one time, and for this company to be able to say "Well, regardless of the fact that a [154] general investigation might consume three or four of five years and have fees paid in, still the amount, the cost of that investigation would bear no reasonable relationship to what we are now attempting to collect," seems to me to be illogical.

Mr. Stanley. It is an offer to prove the cost of investigation relative to rates, and everything of this kind is something with which the commission is not concerned. The offer of proof is itself immaterial.

Mr. Cades. The supreme court of the territory has decided it is very much concerned with it.

Mr. Stanley. It decided just the opposite.

The Court. Counsel is making objection to the offer as well as the question, as I understand it.

Mr. Stanley. Yes.

The Court. The objection is sustained.

Mr. Cades. Q. Will you state Mr. Eaton, what the scope of a general investigation into the affairs of a utility, such as your investigation here, consists of? What I mean by that is, I want you to explain the mechanics of making an investigation?

Mr. Anthony. Your honor, we object to that also. Counsel is seeking to put this evidence on in an endeavor to show an inspection fee of some \$5000 is

(Testimony of F. Homer Eaton.)

reasonable here. If they can show anything they have done, that would be evidence, but to come in here and put the auditor of the public utilities commission on the witness stand and have that officer testify "If we had done something it might have cost us blank dollars," I submit it certainly is not within any issue raised by our defense, and under the [155] plaintiff's own testimony it is not within any issues raised by the plaintiff. The plaintiff contends this is a tax, and certainly if it is not good as a tax it is not good as an inspection fee. We answer it is bad on the face of it; it is a license fee and unreasonable as a license fee. What materiality can any statement of this witness have to the effect "If we had done something it would have cost blank dollars?"

Mr. Cades. I believe counsel misconstrued the question. The purpose of the question is to put into the record, is to have this record clear up what the mechanics, what this commission does do in making an investigation. The court is entitled to know what the scope of its inquiry is, how it goes about making its investigation, whether it puts employees on the job, whether it puts auditors on the job, and how its employees work and what does it entail in making the rate valuation?

The Court. The court will overrule the objection.

Mr. Stanley. Will your honor allow us an exception?

The Court. Yes.



(Testimony of F. Homer Eaton.)

A. If the investigation is for the purpose of establishing a rate base, it depends upon, first, the age of the company, because the analysis of all of the accounts and records are made from the inception of the company. If the records are in good shape, why that analysis can be made quite rapidly; if not, it may entail quite a lot of detail work.

After the analysis has been completed, a complete inventory of the utility's property is prepared, as to the original cost of each unit, as to the date of installation, [156] and its condition. That is turned over to a corps of engineers.

Mr. Stanley. If the records of the company are well-kept, that would be a matter of entire simplicity, would it not?

A. No, not entire simplicity; it depends on the age of the company.

Mr. Stanley. Q. The records would be there, and a matter of comparative simplicity?

A. That would be simplified compared to a company whose records were not kept accurately.

This investigation is turned over to a corps of engineers who make a physical inspection of all the properties. He observes the condition of the units, makes his general remarks with regard to depreciation. His work is then compared with the auditor's work and a final summary submitted, taking into consideration the properties if used and useful in supplying service, and various elements of values figured on these units, such as original cost, new, and

(Testimony of F. Homer Eaton.)

original cost depreciated, reproduction cost new and reproduction cost depreciated.

This valuation report is compiled and submitted to the commission and the commission decides upon the value of the company's property, used and useful, in supplying service at the date of valuation.

Mr. Cades. Q. All you stated so far is the customary way of making an investigation on complaints made to the commission, is that correct?

Mr. Stanley. He has testified when he is making an investigation as to rates. [157]

Mr. Cades. The complaint being as to a rate investigation.

A. If complaint is made as to rate, the valuation not established, the procedure I have just mentioned would be followed.

Q. Do you know whether or not any rate base has ever been established for the Inter-Island Steam Navigation Company?

Mr. Stanley. Objected to as immaterial and irrelevant, and going beyond the scope of your honor's ruling.

The Court. In the absence of evidence there was, the court would have to assume there was not.

Mr. Cades. Q. Have you ascertained at my request the percentage of expenses incurred prior to the year 1932 of the total that was attributable to the companies that are listed as "A" companies on plaintiff's exhibit A, and the percentage attributable to "B" companies of those listed on plaintiff's exhibit A?

(Testimony of F. Homer Eaton.)

Mr. Stanley. Is this not going beyond the scope of what the hearing was for? It seems to me this will be interminable if they are bringing in new schedules and figures prepared by this witness, which we have not seen and have not had an opportunity to examine. It is certainly unfair to us.

Mr. Anthony. The ruling of the court was, your honor, that Brother Cades at the last hearing said "I have proof \$12,000 was spent on behalf of the Inter-Island." We objected to that and asked for his figures. Your honor continued the cause and said produce your figures, and that is what I understand we are here for. This is certainly away beyond any cross-examination of this witness. The court has been [158] quite lenient with the plaintiffs here in allowing them to go to the limit on cross-examination. Now counsel is going into some other phase of expenditures, and again, if the court please, outside the years in question.

Mr. Wild. May I refresh counsel's recollection? We said at the last hearing we would like to show the percentage of expense that class A and class B bore to the whole for the years prior to 1923. At that time we said that we were asking Mr. Eaton to make that investigation and determination. He said he would want to look at those figures again as I understood it, before making a final reply, and that was one of the two things that he was to do: one was to make up this tabulation that we submitted, and the other was to get this positive.

(Testimony of F. Homer Eaton.)

Counsel objected to any evidence along that line at the last hearing upon the ground it was admitted, and we said "Well, saving all proper objections, we should like to have that figure in the record."

Mr. Eaton has prepared an estimate there, along the same general lines as he prepared the other estimate as to the years 1922 to 1930.

Mr. Stanley. Here they prepare a set of figures, and it was to come up on this \$12,000. Now they have other figures, not prepared schedules, not submitted to us, and the only purpose of this is continuing the case until we examine these figures.

Mr. Cades. At the last hearing it was adduced from this witness during the years 1923 to 1930, 60 percent to 80 percent as I recollect, of the money expended was expended primarily on companies in "B" group, so-called. [159] The purpose of this evidence is to show that was a mere matter of accident; that in other years, depending upon the work that this commission has done, the proportion of "B" to "A" figures varies materially from that. In prior years considerably more was spent for "A" companies than for "B" companies. No figures have been allocated to "A" companies and "B" companies; they were just taken out of a revolving fund. This merely completes the picture.

The Court. Objection overruled and the question allowed.

A. On the basis of hearings—

Mr. Anthony. Your honor, I should like to object on one further ground, and that this witness has no

(Testimony of F. Homer Eaton.)

knowledge of these facts to which he purports to testify. He was not there at the commission and he does not know.

Mr. Wild. If that objection is taken as sound then your estimate on the years 1920 to 1930 would have to go out.

Mr. Anthony. He was there.

Mr. Wild. No, he was not there.

The Court. The objection will go to the weight. As I understand, the witness is not testifying as a matter of personal recollection at the time, but the record would show him as an expert witness.

Mr. Stanley. Yes.

A. On the basis of hearings, compiled from our annual reports, which is in the record, 73 hearings were held during the years 1916 and 1917, of which 62 were for the purposes of companies classified in group A and 13 for group B, which represents 83 percent for group A and 17 percent for group B.

For the years 1917 to 1922 there were 203 hearings [160] held, 121 of which were for the companies classified under group A, which represents 60 percent, and 82 for companies under group B, which represents 40 percent.

The Court. All that classification is in connection with the ratio by hearings?

The Witness. Based on the ratio of hearings, that is correct.

Mr. Cades. That is all we have to offer, except we wish to know at this time whether counsel will



(Testimony of F. Homer Eaton.)

stipulate that the facts as stated in the opinion of the Inter-Island Steam Navigation Company, to wit, that the hearings were held in an investigation made, as stated, in 24 Hawaii the part I presented to you at the last hearing, that those facts are true, and that that investigation was started in conjunction with complaints that were filed by various shippers.

Mr. Wild. I learned afterwards upon investigation that the commission had hearings of its own, and after they were started, individual complaints were filed, and that the hearings at the commission's own instance and the complaints, were all heard in the same sittings or hearings, because the complaints filed were complaints as to various and sundry rates charged by Inter-Island.

Now if there is any disposition to question that, I looked it up myself since the last time, we would offer the first two pages of that in this record, and I would ask a recess now, your honor, to get it down, the record in the supreme court, we offered it the last time. The only portion I wished to offer was that portion relating to the complaints, the originals of the petitions, and the hearings. [161]

Mr. Anthony. It is not the fact this was started on complaints. Counsel asked us to admit that at the last hearing, and we said we did not know. I have since found out it was not the basis.

Mr. Wild. Counsel, of course, is quarreling about "starting." Look at the record.

(Testimony of F. Homer Eaton.)

Mr. Stanley. Will counsel admit it is on the report, that "this investigation into the physical and financial condition of the Inter-Island Steam Navigation Company, Limited, was undertaken by the Public Utilities Commission of Hawaii not in response to any formulated complaint on the part of individuals or business organizations, but with the purpose of laying before the people of Hawaii a plain statement of the facts in connection with the public service rendered by this transportation company; all on its own initiative or motion, in accordance with Act 89, Session Laws of 1913 of the Territory of Hawaii"—

Mr. Wild. Very well, but read the rest of it—"that complaints were then filed by numerous shippers." I am not trying to get any fact that is wrong, I am merely asking counsel what the fact is? What is that you are reading from, Judge Stanley?

Mr. Stanley. "Report of the Public Utilities Commission of Hawaii on the public-utility corporation known as Inter-Island Steam Navigation Company, Limited."

Mr. Wild. Read the part about the complaint.

Mr. Stanley. If I can find it.

Mr. Wild. It is very clear in the supreme-court record.

Mr. Stanley. I did not see anything in this. The annual report, fifth annual report of the public utilities [162] commission of Hawaii, for the year 1917 states: "Investigations of the public utilities com-

(Testimony of F. Homer Eaton.)

mission of Hawaii was begun on August 24, 1916, for the purpose of considering passenger tariff No. 2 and freight tariff No. 2, of the Inter-Island Steam Navigation Company, Limited."

Mr. Wild. I am not now asking counsel to read into the record a lot of matter; all I am asking counsel to stipulate is what appears in the record in the supreme court.

Mr. Stanley. We do not so stipulate.

Mr. Wild. Then we offer it in evidence.

Mr. Stanley. Let us see it; we shall not stipulate until we have seen it.

Mr. Wild. Very well, we shall get the record. Read the rest of it.

Mr. Stanley. Will counsel allow us to read it into the record?

Mr. Cades. We mean the report you just started.

Mr. Stanley. "This investigation was a general one into the affairs of the company and not merely a hearing on specific complaints. The commission therefore, went thoroughly into the entire operations of the Inter-Island Steam Navigation Company, Limited, as a public-utility corporation and as a result of this thorough investigation, a state of affairs was disclosed that affected not only the specific complaints made to the commission, but the entire rate schedule of the company."

Mr. Wild. In other words there were specific complaints. That is all I said.

Mr. Anthony. No—

Mr. Stanley. Following the investigation initiated [163] by the public utilities commission

(Testimony of F. Homer Eaton.)

Mr. Wild. I asked counsel to admit that the public utilities commission started investigation on its own motion, not on any complaint. That thereafter complaints were filed by various shippers, complaining of rates. I have forgotten how many there were, but I went up and looked into the record myself this last time. That thereafter hearings were had, not only on these complaints, but all the affairs of the Inter-Island for the purpose of establishing a rate because of the fact—well, I shall not say because of the fact, this is my own conclusion—because of the fact they wanted a general hearing of the whole rate base at that time and not a complaint as to one or more minor rates that were complained of.

Mr. Stanley. It was initiated by the public utilities commission; complaints were made and a general investigation was had.

The Court. Amalgamating the hearing started on the initiation of the commission with the minor hearings on complaints.

Mr. Anthony. We are agreed on that.

Mr. Wild. Except the word minor, your honor; I do not think that any attack on a rate base is a minor hearing.

The Court. Let the record show that the word minor was interpolated by the court.

Mr. Stanley. It is understood the excerpts from the report as read by me may be considered in evidence?

Mr. Wild. If you are going to have any of it in, perhaps it all should go in.

(Testimony of F. Homer Eaton.)

Mr. Stanley. The whole report? [164]

Mr. Wild. No, that part pertaining to the complaints. For instance, the report goes on to show a complaint of Edward Scharsch, and investigation of the complaint of Kalihi Taro & Land Company, Limited.

Mr. Stanley. What you are reading from is "Complaints—Informal," and the complaint of Edward Scharsch was for loss of goods. You do not want that in?

Mr. Wild. I thought I had the one that has the list of those complaints.

It appears on page 5, this is the decision of the commission. From the decision of the commission, which appears on page 5 of the decision, but marked page 7 on the lefthand column of the report appears the following:

"Subsequent to the action of the commission setting a date for a general investigation into the affairs of the company, complaints were received by the commission, protesting against a proposed new tariff issued by the company, to take effect September 1, 1916, from the following: Alfred W. Carter, trustee; Maui Chamber of Commerce, Committee of the Maui Chamber of Commerce; Wiluku Sugar Company. The complaint of the Maui Chamber of Commerce follows." No, I do not think that is material.

The thing is just as we stipulated; that there were complaints filed, and the portion I read and the



(Testimony of F. Homer Eaton.)

pages referred to appear in the record of the supreme court, No. 1050, in re Inter-Island Steam Navigation Company, Limited.

Mr. Stanley. I think that the excerpts read from the report may be considered in evidence.

Mr. Wild. I have no objection. We are not trying to put anything across. [165]

Mr. Anthony. You asked us to admit it was started on complaint.

Mr. Wild. I told counsel frankly I had never seen the record. All I wanted counsel to do was admit what is in the record.

The Court. Does counsel want to examine Mr. Eaton now?

Mr. Stanley. Yes.

### Cross Examination

By Mr. Stanley.

Q. Have you got a copy of plaintiff's exhibit C, Mr. Eaton?

A. I have.

Q. Now what is this item of undistributable expense?

A. That represents—first I should explain how this statement was prepared and that will answer that question.

Every voucher on file in the public utilities commission for the two years 1916 and 1917 were examined and distributed in accord with the case, in the name of the investigation for which the expendi-

(Testimony of F. Homer Eaton.)

ture was made. Where we found vouchers that were not earmarked, that is, to any one specific investigation and case, we put that into a column called undistributables.

For instance, the secretary's salary, and office and telephone and other miscellaneous expense one could not allocate in any particular case, just goes in a column called undistributable expense.

Mr. Anthony. Now, all of the items of expense other than the amounts distributable particularly to the Inter-Island and other cases were of the description you have just recited, is that correct?

A. With the exception of expenditures made for the acquisition of assets, like the purchasing of a desk or equipment [166] or something like that, which is called capital expenditures, I did not classify that as expense.

Q. One item in 1916 of \$769.23?

A. That consisted of more than one item, but that is the total for that year.

Q. For 1917 a capital expenditure of \$165.50?

A. That is correct.

Mr. Wild. But no part of that was divided up, was it?

A. No.

Mr. Anthony. Q. By the way, what are these miscellaneous cases for the year 1916?

A. That would be Mutual Telephone Company, Iilo Traction Company, Hawaii Railway; some Honolulu Rapid Transit, I believe; some electric companies, and a general run of companies.

(Testimony of F. Homer Eaton.)

Q. What electric companies, do you know?

A. I should have to refer to the report.

Mr. Wild. Counsel wants your report; counsel wants that accurately, not just by way of illustration. Counsel wants the actual companies, does he not?

Mr. Anthony. Yes.

Mr. Wild. Yes, if you will.

A. Mutual Telephone Company; Kauai Telephone, Kauai Telephone, Hilo Traction,—

Mr. Stanley. Hilo Electric?

A. No, Kauai Telephone, Hilo Traction, Honolulu Rapid Transit, Maui Telephone, Island Electric, Lahaina Ice, Hawaii Telephone, Hilo Electric, Kohala Telephone, Honolulu Gas, Hawaiian Electric, and Inter-Island.

Mr. Stanley. Well, you have already included Inter- [167] Island, have you not?

A. Oh, yes, that is there, that is correct.

Mr. Anthony. Q. And for the year 1917, what were the other cases?

A. There were no others.

Q. What?

A. There were no others, no other hearings. There were investigations of cases.

Mr. Stanley. Q. The question is, what were these other miscellaneous cases in those respective years to which the items of expense were attributable?

A. I can only answer that by telling you the hearings, here. I have not the details for the various companies; I can get them for you.

(Testimony of F. Homer Eaton.)

Q. You say for 1916 you have given us the other companies, and for 1917 you have a total of \$3945.88?

A. Yes.

Q. —for the expenses attributable to other miscellaneous cases. What we are inquiring is, what were those other cases? What other companies were there in the year 1917?

A. I can not answer that unless you want me to answer the entire amount shown on the list here. I can not tell. I should have to go through the same amount of work to get that as I should the Inter-Island.

Q. Where did you get the figures here of 3000 odd dollars?

A. Perhaps I did not make myself clear, Judge Stanley: When we analyzed the vouchers, everything applicable to the Inter-Island was put in a column; everything not applicable to any case was thrown into undistributable, and all the rest applicable to other companies not detailed was [168] put in one column called other miscellaneous cases.

Q. We are asking you for the ones for 1917?

A. I think you still misunderstand me, I have not given you the analyses for 1916 and 1917, I can not give it to you because I have not got it. I have given you the list of hearings held in 1916. I said that is the only way I can explain to you what companies that covered. I can not tell you unless I analyze it. I can do that if you wish, and shall be glad to.

(Testimony of F. Homer Eaton.)

Q. We should like to have you do so; it is misleading as it appears now. You say you have no figures now from which you can tell us what the other companies were in connection with items appearing for the year 1917 in the second column, are?

A. Or 1916:

Q. You have given us 1916?

A. Well—

Mr. Cades. I think you have misunderstood, Judge Stanley. He has given you a list of companies concerning which hearings were held during the year 1916. You are asking him to state what companies specifically are meant in the words "other miscellaneous cases," are you not? The witness says he has not compiled those, they were put in one group.

Mr. Stanley. What are the specific cases? There is no answer to the question as to 1916. Apparently we got those without hesitation, but when it came to 1917, then for the first time the witness says he can not give us the cases.

Mr. Cades. What the witness gave you was a list of [169] companies concerning which hearings were held.

The Court. I understand that would only be applicable, take in 1916, in connection with hearings, the item "Commissioners' salaries" has been allocated \$970 to hearings that had to do with the Inter-Island Steam Navigation Company, Limited, the balance of the hearings being under "other miscellaneous cases."



(Testimony of F. Homer Eaton.)

Now the "auditor's fees", the procedure and his allocation was to take the vouchers for auditor's fees, which was shown in connection with the vouchers on file with the Inter-Island, and put all the rest of the vouchers for auditor's fees into other miscellaneous investigations.

Mr. Stanley. Yes.

The Court. Taking the item "office and clerical expense," he was only able to allocate definite \$445.90 to other miscellaneous cases and none to the Inter-Island, and the ledger figure and undistributable expense for clerical and office expense went into the grand total for that year.

Printing was not allocated by this ratio of hearings that he has given you, a list of hearings for 1916, but would only allocate by vouchers \$66.60, shown on the vouchers to be connected with Inter-Island investigation, and as to other printing, it was put in connection with the other-miscellaneous-expenses proposition.

Now when you come down to 1917, is there any figure Mr. Eaton, of hearings, that you are able to give, which shows the allocation of \$430, commissioners' salaries, to Inter-Island hearings, and \$1400 to other hearings?

A. No, this \$1400, your honor, represents expenditures [170] made for investigations for which, most likely, there was no hearing.

The Court. Q. Would not commissioners' salaries have to be for meetings?

(Testimony of F. Homer Eaton.)

A. It would be for meetings, but it would not necessarily be a hearing.

Q. And auditor's fees for 1917 are divided by reason of a voucher itself showing auditor's fees—services to the total of \$765 Inter-Island, and all the balance is thrown into miscellaneous?

A. That is correct.

Q. And the same method in regard to printing items and the same method in regard to transcript items?

A. That is correct.

Q. And no travelling expense in 1917 connected with Inter-Island?

A. Yes.

The Court. Does that help answer your question, Judge Stanley?

Mr. Stanley. Yes, I understand that now.

Mr. Anthony. Q. Mr. Eaton, coming down to your summary here, you have listed in your summary an item of direct expense because of the Inter-Island case \$7239.58, and direct expense because of other cases \$11,120.64. Then you have got a total of \$18,360.22. That is correct, is it not?

A. That is correct.

Q. And the figures on the—opposite this direct expense those percentages are the percentages of the Inter-Island direct expense to the whole direct expense for various [171] investigations, is that correct?

A. 39.43 percent, you are referring to?

(Testimony of F. Homer Eaton.)

Q. 39.43 percent?

A. That is applied on the undistributable expense.

Q. That figure is founded is it not, on the amount of money expended directly for the Inter-Island?

A. It represents the total ratio of expense applicable to investigations.

Mr. Stanley. Q. That is, the investigation of the direct expenses?

A. Of all investigations.

Q. 39.43 percent of all investigations, and 60.57 percent represents the portion of all expenses attributable to investigations of companies other than Inter-Island?

A. All direct expenses.

Q. All direct expenses?

A. That is right.

Mr. Anthony. Q. And you have reached the conclusion that from that proportion you should charge the Inter-Island 39.43 percent of the indirect expenses, is that what you mean to do here?

A. I would not say conclusion.

Q. You have written it down here—

A. This is an arbitrary allocation of undistributable expense amounting to \$13,657.62, based on the ratio that the direct expense of Inter-Island bore to the total expense incurred because of all investigations. It is merely arbitrary, it is debatable. I do not know any other way to allocate it unless you allocate it on the [172] basis of hearings that I have testified to.

(Testimony of F. Homer Eaton.)

Mr. Stanley. Q. That is merely arbitrary?

A. That is merely arbitrary and debatable.

The Court. Q. Mr. Eaton, taking the figures in 1916 under the column "undistributable expenses, office and clerical expense, and office rent and expense." Would not those two items be items of expense if there were no hearings whatsoever, of anything?

A. That would be in the same class of overhead of a concern operating a business.

Q. The overhead would be necessary in order to be there to do business?

A. That is correct.

Q. And the same would be true for the year 1917 for the same two items?

A. That is correct.

Q. But the figure for attorneys' expense, in 1917, you have allocated a part of that attorneys' expense directly to the Inter-Island?

A. That is correct.

Q. The other part of the expense, \$1971.78, attorneys' expense, it appears in the voucher not relating to the Inter-Island?

A. It is moneys that have been paid to attorneys and it is very difficult matter to allocate that because the attorney may have been working on one case or ten cases or 15 cases a week. I did not think I was qualified to try to separate that so I put it down as undistributable expenses.

Q. But out of a total of \$3000 odd, \$1500 was applicable to the Inter-Island? [173]

(Testimony of F. Homer Eaton.)

A. Payments made for the services in the Inter-Island case.

Q. There is nothing from the rest of it by which you could make any allocation?

Mr. Anthony: Your answer is no? You shook your head.

A. That is correct, I could not allocate.

The Court. Q. It might have been service rendered entirely on advice to the commission on things having nothing to do with the Inter-Island, or it might have had something to do with the Inter-Island and you do not know anything about it?

A. That is correct.

Mr. Wild. I think the item of attorneys' fees is properly debatable as an item of overhead there, although I do not know.

Mr. Stanley. Q. In order to arrive Mr. Eaton, at this figure of total expenses charged against the Inter-Island of \$12,624.78, you proceeded on the theory that all of the expenses except the capital expenditure for furniture, and so forth, are attributable to the companies in connection with which investigations were made?

A. That is correct.

Mr. Wild. I should like to clear up one little matter if I may be permitted to do so.

Q. Was any part of this item \$13,657.62 an expenditure for capital asset like a typewriter, or anything like that?

A. None whatever.



(Testimony of F. Homer Eaton.)

Q. That was all money expended for some type of rent or service that was expendible for such things during the current year?

Mr. Stanley. No, that is not so. [174]

Mr. Wild. —and for which the public utilities commission received no asset, is that correct?

A. That is correct.

Mr. Wild. That is just overhead expense, Judge Stanley.

Mr. Stanley. Yes, I see.

Q. So then in order to arrive at the respective percentages of 39.43 percent to the Inter-Island company, which was being invested during the years 1916 and 1917, and the percentage of 60.57, which was attributable to the other companies in connection with which investigations were made, you made no allocation of the charges to companies in connection with which no investigation was made?

A. That is correct.

Q. What relation then, Mr. Eaton, is there between the fees paid by the utility companies and the services performed by the commission in connection therewith?

A. You ask the relation between the fees paid and the services performed?

Q. Yes.

A. —It is my opinion there was very little relation. I believe the companies that pay the least amount of fees, at least in our experience, have been rendered the greatest services.

(Testimony of F. Homer Eaton.)

Q. Could you tell us the dates of the hearings on the Inter-Island investigations for the year 1916?

(Witness refers to book.)

Mr. Anthony. The date that the investigations began.

Mr. Wild. I believe, your honor, that is all stipulated in the supreme court statement of facts of the case, which we prepared. [175]

Mr. Stanley. That is, when it commenced, and when it ended. I want the dates furnished. We are charged here in this analysis, attributed to the Inter-Island investigation, some 39 percent of total disbursements for two years; for two years.

Mr. Wild. Yes.

Mr. Stanley. As a matter of fact we had the figures for the 1917 hearings, not for 1916, and they show that the main hearings in 1917, the great bulk of hearings, took place in the months of May and June of 1917, and I should like to have the same figures for the year 1916.

Mr. Wild. Is counsel just trying to fight the general proposition that a business overhead is no expense?

Mr. Anthony. We are asking this witness a question, we are not asking counsel a question.

Mr. Wild. May I confine myself to one counsel at a time?

Mr. Stanley. Yes, certainly.

Mr. Wild. Does counsel contend that overhead is not attributable?

(Testimony of F. Homer Eaton.)

Mr. Stanley. I have not talked about that at all. My question is whether or not now we are charged with 39 percent of the total expense for two years? I want to know when the hearings were in 1916?

A. They started September 15 and the last one in 1916 was December 19.

Q. Five hearings in September?

A. Five hearings in September, 12 in October.

Q. Yes?

A. Ten in November. [176]

Q. Yes?

A. Four in December.

Mr. Wild. Q. Were there any other hearings during that period?

A. There were in 1917.

Q. No, no, just in this list. I thought we would clear it up.

A. No hearings, September to December.

Mr. Stanley Q. And the hearings in 1917 were—

A. The hearings in 1917 were from February 8 to October 23, being 20 hearings.

Q. Two in February?

A. Two in February.

Q. Three in March?

A. Three in March.

Q. Seven in May?

A. Seven in May.

Q. Six in June?

A. Six in June.

Q. None in September or October—none in July, August or September?

• (Testimony of F. Homer Eaton.)

A. Correct.

Q. —and two in October?

A. Correct.

Mr. Wild. Q. Were there any other hearings during that period of any other utility?

A. None whatever.

Mr. Stanley. During what period?

Mr. Wild. 1917.

A. No other hearings.

Mr. Stanley. Q. These approximate expenses for the years 1916 and 1917 that you gave in answer to Mr. Cades's question, were purely arbitrary, based on hearings, the number of hearings?

A. That which is shown on the typewritten statement? [177]

Q. No—

A. That was based on the hearings held during the period.

Mr. Cades. Q. That refers to a later estimate, is that right?

Mr. Stanley. The last one.

Mr. Wild. Not appearing on exhibit C.

We rest, your honor. We are all rested.

The Court. The court will rest while you prepare an order.

Mr. Wild. Very well.

Mr. Anthony. The last time your honor said ten days. I do not think that is time enough.

Mr. Wild. We are not disposed to press counsel in the matter of limitation of time.

Mr. Anthony. An adequate brief would take a week or so, at least.

The Court. The court will leave the time open and limit it if the time gets too extensive, upon complaint of counsel.

(Hearing closed)

[178]

---

In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii.

[Title of Cause.]

### TRANSCRIPT

The above entitled matter came duly on for hearing on Tuesday, January 9, 1934 at 9 o'clock a. m., before the Honorable A. M. Cristy, Judge of the Second Division of the aforesaid Court, presiding,

J. Russell Cades, Esq., appearing for the firm of Messrs. Smith, Wild & Beebe, Attorneys for Plaintiff, and

J. Garner Anthony, Esq., and N. M. Newmark, Esq., of the firm of Messrs. Robertson & Castle, and Roy A. Vitousek, Esq., of the Firm of Messrs. Smith, Warren, Stanley & Vitousek, appearing as attorneys for the defendant,

Whereupon the following proceedings were had and testimony taken:

Mr. Cades: I have presented a demurrer to the fourth amended answer that was filed in this case, and I should like to present my argument on this special demurrer, showing the reasons for the de-



murrer, to the effect that there is nothing set up in the answer which constitutes a defense and a cause. I think after hearing this demurrer [179] and a decision on the demurrer, it will be unnecessary to take any further evidence in the cause. May I proceed with my arguments, your Honor?

Mr. Anthony: I would like to be heard on the propriety of filing a special demurrer before we proceed with what is in the demurrer.

(Argument by Mr. Anthony.)

The Court: I should take the special demurrer, Mr. Anthony, as being an advance notice of objections to the introduction of your evidence.

(Argument by Mr. Anthony.)

The Court: I feel about this case, Mr. Cades, in this fashion, that the questions of law that are going to apply to this case are questions of law which, while this Court is called upon in the first instance to determine, that the eventualities in a case of this kind are such that higher Courts may have something to do with this, and that the fullest possible admission of reasonable, factual evidence should be permitted, even to the extent, possibly, of letting in things which you desire argument on the law, might have been eliminated on this Court's theory, and yet this Court's theory on a particular matter, this Court's idea, may have been wholly erroneous. So that to the extent of what counsel on their side can figure, or the possible factual issues, let's get them completely exemplified here, and then thresh out to the best of our ability the situation,—of course,

within reasonable limits. I don't want to sit here and make an extensive record just for the purpose of satisfying counsel.

(Argument by Mr. Cades) [180]

The Court: So that I can understand really what it is addressed to, might I ask Mr. Anthony to clarify this situation for me. You have been through sessions or hearings on certain types of evidence heretofore, and in a brief manner, Mr. Anthony, before I listen to any argument on the admissibility feature of it, give me some idea of what the character of the proof is that you now desire to add to the record, as briefly as you can.

(Statement by Mr. Anthony.)

(Argument by Mr. Cades and Mr. Anthony.)

The Court: I don't mean to interrupt your argument at this point, Mr. Anthony, but I wanted to get an idea of the type of evidence, say from the standpoint originally suggested.

(Argument by Mr. Anthony.)

Mr. Cades: In order that my objection may appear clearly on the record, as I understand the proceedings so far, it appears in this answer the first objection that was taken to the jurisdiction of the Territory was taken on the ground that the act of Congress, to-wit, the shipping act, had removed all the regulatory power of the Territory. That question was taken to the Supreme Court of the Territory of Hawaii, and it was decided in no uncertain language that the shipping act did not take away the power of this Territory to tax or to investigate the affairs

of the Inter-Island. That brought the case down from the Supreme Court. The second point was taken by counsel on the other side that the fees in this case were not really fees, because they exceeded the cost of the service that was performed. That part of the argument and that part of the defense has been covered by them. That has been introduced, and is part [181] of the evidence that has been submitted to your Honor.

Now counsel comes along with a third version of the defense, to-wit, that the character of gross receipts is of a nature that removes the gross receipts as one of the things that can be taxed by this Territory, and defendant says it is removed from our taxing power for three reasons: One: It is interstate commerce; two, foreign commerce; and, third, it is receipts from the United States.

(Argument by Mr. Cades.)

Your Honor, the only reason I call this to your attention is that to permit all of this miscellaneous testimony to go in, which will require cross-examination on our part, and rebuttal, will unnecessarily clutter up this record and put before this Court and appellate Courts, otherwise, things that are irrelevant and immaterial, and at this time I want to object to the introduction of any evidence purporting to be evidence to describe the quality of gross receipts received by this defendant where such gross receipts are derived from the public utility business.

(Recess)

(Argument by Mr. Anthony and Mr. Cades.)

(Recess)

(Argument by Mr. Anthony and Mr. Cades.)

The Court: The Court feels in regard to this argument now made, there is some doubt in the Court's mind as to just how it should be applied, but without confusing the case by a ruling at this time, and so that the Territory:—the Public Utilities Commission can save its rights at the present time, the Court will overrule the objection and allow an exception in the record. [182]

(Further argument by Mr. Cades.)

The Court: Might I interrupt counsel by this observation. If your point is well taken, Mr. Cades, and would be decisive of the case in your judgment, then the prima facie affirmative showing, without any cross-examination whatsoever, or any attempt to show the inaccuracy of the alleged facts, would not in any way remove the efficacy of the point which you have taken, but would simply be sitting up and saying to the Court, in line with your present objection, "All right, Your Honor has overruled me, and allowed the evidence to come in, and we think the whole subject is so wholly immaterial we are not concerned with its truth or its falsity in that respect and are willing to stand on that objection," and that would obviate any lengthy discussion here, or cross-examination, or application of the record, but would simply clarify in the actual brevity of a prima facie showing what would otherwise merely be an offer of proof, which the Court is aware, and you are aware,

might not be as exactly bounded as the *prima facie* showing of fact, as the all-inclusive situation.

(Argument by Mr. Cades.)

The Court: I can suggest a further method of procedure that would simplify what *your fear* in the record, and that is, after the *prima facie* showing a few days of reasonable investigation of those facts, without cross-examination, might be allowed you, so that if there is any gross error that you think really goes to the point of being wrong, you can consult with counsel as to the correction of that very situation. I would assume from the character of the [183] gentlemen in attendance they would not intentionally attempt to mislead the Court, but might, in view of the frailty of human nature, might unconsciously read the wrong figures at the right place. I will overrule your objection made, and allow a *prima facie* showing to be made, and when you really hear what they are trying to really prove, maybe your troubles will be over. Do you care for an exception in that regard?

Mr. Cades: I will make my objection. I will object at this time to any evidence been admitted in this cause on all the grounds stated in the demurrer, and that covers all evidence tending to describe the character of gross receipts by this defendant, on the ground that in the statute there is no provision that such gross receipts shall be excepted.

The Court: The Court at this time overrules the objection and allows your exception, and says to you, at the conclusion of all the evidence that the Court



will not take it amiss to remind it at that time of the points you have raised, and require the Court to again rule on them.

**STANLEY KENNEDY**

was called as a witness for the defendant herein, and, being first duly sworn, testified as follows:

(Direct Examination.)

By Mr. Anthony:

Q. State your name, please.

A. Stanley Kennedy.

Q. What is your occupation?

A. I am now president and general manager of the Inter-Island [184] Steam Navigation Company, Ltd.

Q. How long have you been connected with that company?

A. Since 1913, except for a period of about two years during the war that I saw service.

Q. Will you state briefly your experience in connection with the company?

A. I was originally employed as a junior clerk, and from the time that I started my work of employment in the company I have been on the docks, been on some of the steamers, I have been in the main office in several capacities, and in the passenger department, freight department, accounting department, and the cashier's department, and have been up through the operating department, as operating manager, in close contact with the shipping,

(Testimony of Stanley Kennedy.)

the shipping end of the business,—that is the transfer of freights, the operation of the steamers, and in close contact with the operating personnel of the company on the docks, as well as on the steamers.

Q. Mr. Kennedy, it is a fact, is it not, that the production of sugar is the chief business of the Territory of Hawaii.

A. Yes, sir.

Q. And sugar is produced on practically all of the Islands, the larger Islands of the Hawaiian group?

A. The Island of Hawaii, Maui, Kauai and this Island.

Q. Now do you have ports on Islands other than the Island Honolulu is on, and what are those ports?

A. On the Island of Kauai we have Waimea,—Are you discussing the ports of the Islands between the period that we are discussing?

Q. Yes.

A. The port of Waimea,— [185]

Mr. Cades: Is that from 1922 to 1930?

A. To 1929.

Mr. Anthony: Inclusive.

A. (Continued) On the Island of Kauai the ports of Waimea, Makaweli, Port Allen, Koloa, Nawiliwili, Ahukini, Kekaha, Kilauea and Hanalei,—on the Island of Kauai.

(Witness temporarily excused.)

**JOHN K. CLARKE**

was duly called and sworn as a witness for the defendant, and testified as follows:

**Direct Examination**

By Mr. Anthony:

Q. Your full name, please.

A. John K. Clarke.

Q. Mr. Clarke, you were formerly employed with the Waterhouse Trust Company?

A. I was.

Q. The Waterhouse Trust Company was the agent for Gay & Robinson, a sugar plantation on the Island of Kauai?

A. Yes.

Q. Who handled the transshipment of sugar from the Gay & Robinson plantation to overseas vessels?

A. I did that, largely.

Q. During what years, Mr. Clarke?

A. I joined the trust company in 1922, I think it was, and I am still handling it.

Q. You are still handling what?

A. I am still handling the sugar shipments.

Q. During the years 1922 to 1929, inclusive, will you state how the sugar produced by Gay & Robinson on the Island of Kauai was transmitted to the Mainland of the United States? [186]

A. The Robinsons owned their private landing at Makaweli. The arrangements were made for steamers to call in there periodically.

Q. Inter-Island steamers?

(Testimony of John K. Clarke.)

A. Inter-Island steamers. They picked up the sugars and brought them to Honolulu for transshipment to the Western Refinery in California.

Q. Now, Mr. Clarke, was there ever any intention of keeping that sugar in Honolulu when you ordered the Inter-Island boats to pick it up? L

A. No, the Gay & Robinson sugars are contracted for with the Western Refinery, and the shipments all went through. At no time during that period was any sugar retained in Honolulu.

Q. And is it correct to say that on every occasion when you ordered an Inter-Island Steamer to pick up sugar at Makaweli that you knew at that time that the sugar was destined for the mainland of the United States?

A. It was definitely understood. As a matter of fact we had already provided space on the Matson steamers for the sugar before we brought it up.

Q. Now how was your insurance carried, Mr. Clarke?

A. We carried a through policy, covering all sugars from the time they were shipped at Makaweli until delivery was made to the refinery. We secured a better rate by insuring them in that way.

Q. Now that transaction that you have just described, of the Inter-Island boats picking up Gay & Robinson sugar for transshipment in Matson boats took place over a period from the year 1922— [187]

A. Yes, until within the last two years they have been shipping direct from Port Allen by Matson steamer.

(Testimony of John K. Clarke.)

Q. During the years 1922 to 1929 did the Matson steamers ever go down there?

A. Not to Makaweli. We brought the sugar to Honolulu.

Q. The last few years, you say, the Matson steamers took the sugar directly?

A. From Port Allen,—the sugars are sent across to Port Allen and transshipped from there to the refinery.

Q. Port Allen is on the Island of Kauai?

A. Yes, sir.

The Court: I take it these are all raw sugars that you refer to?

A. All raw sugars.

Q. Was there any change in the character of that sugar from the time it left the Makaweli landing until the time it was transshipped on overseas vessels to Crockett, or to the Western Refinery wherever it was?

A. No, it was still raw sugar, not processed at all.

Q. Still shipped in the same bags?

A. Yes, sir.

Q. Is raw sugar ever sold here in Honolulu?

A. Little, if any, of it. Some of the plantations, of course, refine sugar,—the Honolulu Plantation, for instance, refines sugar, the entire crop almost is sold locally. The pineapple canners buy it, very much of it.

Q. But none of the Gay & Robsion sugar is refined or processed in any way?



(Testimony of John K. Clarke.)

A. No, all sold as raw sugar to the refinery.

Q. Now, are you familiar with the shipment of sugar from the Brewer plantations? [188]

A. Well, I am only familiar in this way, that at times our crop was small, and naturally we had to work in with them to some extent in order to accumulate enough sugar. At one time the steamers would not go across the bay for anything under a thousand tons, they would not move it, so we at times accumulated our sugar with Brewer in order to secure the tonnage to warrant a Matson steamer going across there to pick it up.

Q. A Matson steamer or the Inter-Island?

A. No, the Matson steamer. It was after it was landed at the pier over there; the terminal.

Q. You are referring to the Inter-Island terminal pier?

A. Yes. What we did was this. We would bring the sugar up and accumulate it in the Inter-Island terminal. Now sometimes we would only have 500 tons there, and if we did not secure the help of Brewer & Company with additional sugar tonnage it would cost us something to get the Matson steamer across there. To avoid that we accumulated our sugars with theirs.

Q. Now, Mr. Clark, do you recall whether or not the Gay & Robinson sugar was ever directly loaded on Matson vessels by the Inter-Island boats?

A. We have at different times done that. Of course where we could do that we avoided the handling charges, this discharging into wharves, and

(Testimony of John K. Clarke.)

storage and loading back again. Whenever we could we endeavored to do that. At times we did.

Mr. Cades: Q. Is that in Honolulu?

A. Yes, in Honolulu.

The Court: Q. That is, you are testifying, as I understand, [189] that sugar picked up by the Inter-Island at Makaweli would sometimes be so managed that when it got to Honolulu instead of going to the warehouses here it would go direct to a Matson ship here?

A. Yes, you see there was a saving in doing that, in the charges.

The Court: Q. Do you know of any refiner of sugar on the Island of Kauai?

A. There is none produced there, no.

The Court: Q. All raw sugar?

A. All raw sugar, yes, sir.

Mr. Anthony: Q. In your testimony referring to the Matson ships, you are referring to the Matson line that travels between Honolulu and the mainland of the United States?

A. Yes, sir.

#### Cross Examination

By Mr. Cades:

Q. During the years 1922 to 1929 do you have any idea as to the amount of freight that you paid to the Inter-Island Company for the shipments that you have been talking about?

A. I could not tell off-hand. The freight rate was something around,—I guess Mr. Kennedy could

(Testimony of John K. Clarke.)

answer that better than I,—somewhere around three dollars a ton, I should think the tonnage of the Robinson plantation was somewhere in the neighborhood of seven thousand tons a year, which would be twenty-one thousand dollars a year, something like that. Mr. Kennedy, however, could answer that, I think.

Q. And you are familiar with the form of the bills of lading that were given for the sugar, are you? [190]

Q. They were not through bills of lading?

A. No, sir. The Inter-Island contracted to bring the sugar from Makaweli to Honolulu. When landed in the warehouse the sugar was our risk; we had of course to take care of it.

Q. And you took all of the risk of handling and turning the cargo over, either into the warehouse or into another ship, for transshipment of that cargo?

A. Well, it was handled by them, but you see the Matson Company would take delivery from the warehouse over there with their own labor.

Q. From their establishment in Honolulu?

A. At the Inter-Island pier in Honolulu.

Q. There was no different rate given to you for transshipment of sugar than there was for material that was just to be shipped to Honolulu and landed in Honolulu?

A. No, there was a definite freight rate from Makaweli to Honolulu, irrespective of whether it went into the steamer or otherwise.

(Testimony of John K. Clarke.)

**Redirect Examination**

By Mr. Anthony:

Q. Mr. Clarke, handing you "Hawaiian Sugar Crops, 1922 to 1931," a publication of the Sugar Planters' Association, do the Gay & Robinson sugars appear there?

A. Yes.

Mr. Anthony: You have no objection to this being received in evidence, Mr. Cades?

Mr. Cades: May I see what it is. (Document handed to counsel.)

The Court: Do you want to state what it is, for the purpose [191] of the record?

Mr. Anthony: I offer in evidence, if the Court please, statistics compiled by the Hawaiian Sugar Planters' Association for the years 1922 to 1931, inclusive, showing the tonnage of sugar on the several islands of the Hawaiian group.

Mr. Cades: Tonnage of crops, that is, by plantations?

Mr. Anthony: Yes.

Mr. Cades: I have no objection, your Honor.

The Court: It may be marked. We will call this "AA."

(Document offered in evidence is received and marked: "Defendant's Exhibit AA.")

[Defendant's Exhibit AA here introduced is set forth in this printed transcript at page 72.]

Mr. Clarke, I call your attention to the Gay & Robinson sugar as listed on this Defendant's Ex-

(Testimony of John K. Clarke.)

hibit "AA", and I want you to note particularly that the tonnage is approximately five thousand tons per annum?

A. That is correct.

Q. Were there other sugars?

A. No.

Q. Or was your first statement—

A. No, the crop has increased now.

Q. Over the years in question?

A. Yes. The crop this year is something around seven thousand tons.

The Court: But during these years in question?

A. This is correct. These figures are compiled by the plantations to the Sugar Planters Association yearly, and these figures are authentic.

Q. If the figures appearing on the statistical sheet were grossly inaccurate, would that come to the attention of the producers you refer to? [192]

A. Yes, these would be sent by slips to the plantations, and their signed slips are returned, and from that these sheets are prepared.

Mr. Anthony: Q. Mr. Clarke, have you taken into consideration the Hawaiian Sugar Company lease, under the terms of which lease the Robinsons are paid in sugar?

The Court: You mean in this five thousand?

Mr. Anthony: In addition to the five thousand tons of sugar.

A. The other is in addition. That is the exact amount shipped. There is an arrangement down



(Testimony of John K. Clarke.)

there whereby,— they have no mill, and they have a milling arrangement with the Hawaiian Sugar Company whereby they pay for the milling a certain part of the sugar.

Q. Would that appear on this statistical sheet?

A. No, that would be in the Hawaiian Sugar Company's return, as part of their sugar.

Mr. Cades: By that you mean Gay & Robinson have no mill?

A. Yes.

Q. So that, do I understand you correctly, that the figures of sugar produced, averaging around 5000 tons a year, as shown in that Exhibit AA, would represent the sugar shipped by you, not including the sugar given for services,—as you got from the other plantation?

A. Well, this would represent the actual shipment.

Q. Exhibit "AA",—as shown here?

A. Yes. The balance of course will have been taken out by the Hawaiian Sugar Company prior to the shipment, you see.

Mr. Anthony: Q. Mr. Clark, is there any difference in the present-day shipment, directly from Port Allen, than there was at the time when you shipped via Honolulu and Inter-Island [193] boats?

A. Just what do you mean?

Q. I mean, in the transaction; is there anything different?

(Testimony of John K. Clarke.)

A. No, our insurance policy is still the same, of course, that is, covering the sugars from the time of shipment until delivered to the refinery, only that the Inter-Island boats do not touch it. The Matson steamers go down to Port Allen and load it directly aboard.

Q. The only reason the Inter-Island boats carried it was because the big steamers did not stop there in the years in question?

A. Yes, you see with the change in the railroad down in Kauai they extended their line to make it possible for Gay & Robinson to truck their sugar to Port Allen and ship from that port direct, which of course saved the Inter-Island freight.

#### Recross Examination

By Mr. Cades:

Q. Do I understand a summary of your testimony would be that during the years in question approximately the amount of tonnage indicated as Gay & Robinson tonnage on the Exhibit "AA" was actually loaded on to Inter-Island steamers in Kauai for transshipment to the mainland, is that correct?

A. That is correct.

Q. And that now an extension of a railroad makes it possible for you to connect up with the Matson dock direct?

A. Well, we have been trucking our sugars down there. Of course the railroad brought the matter up. Offers were made for reductions in the freight

(Testimony of John K. Clarke.)

rate from Makaweli to Port Allen,—you see that is where the sugars have come, [194] resulting in this saving, so that they decided they would ship direct instead of by Inter-Island steamers.

Q. It is true that during these years, though, there was nothing shipped direct by Matson liners to the mainland; all your crop was handled by the Inter-Island?

A. Yes, that is correct.

(Witness excused.)

### STANLEY KENNEDY

resumed the stand for further examination, and testified as follows:

#### Direct Examination (Continued)

By Mr. Anthony:

Q. Mr. Kennedy, I believe you mentioned all the ports of call—

A. On Kauai.

Q. What are your ports of call on the Island of Hawaii?

A. Hilo, Paeuhau, Honoka, Kukuihaele, Mahukona, Kawaihae, Keahole, Kailua, Keauhou, Napoopoo, Hookena, Hoopuloa, Hanuapo, and Punaluu. In 1926, or since 1926, Hoopuloa has been out of the picture, and another little village, on account of the lava flow.

(Testimony of Stanley Kennedy.)

The Court: From the geographic standpoint, you have attempted to follow the Island around?

A. Yes.

Q. And on the Island of Molokai?

A. Kaunakakai, Pukoo, Wailau, Kalawao and Kalaupapa.

Q. And on the Island of Maui?

A. Well, Kahului, Kaanapali, Mala, Makena, Kaupo, Hana and Keanae.

Q. Now, Mr. Kennedy, how about the Island of Lanai? [195]

A. On the Island of Lanai we have two ports there. That is one now, though, since the Hawaiian Pineapple Company has gone in, and that is at Kaunalapau and at Manele. I did overlook Kipahulu on the Island of Maui that we called at in the very early period of this,—in the early period or years of this period that we are discussing.

Q. Now, Mr. Kennedy, I believe you stated that one of the principal business of this Territory is the production of sugar?

A. I believe it is, yes. I know it is.

Q. Sugar is brought from the various Islands of this group, or at least was over the years in question, to the port of Honolulu, is that correct?

A. Yes, that is true.

Q. And in what condition was that sugar when it was picked up by the Inter-Island boats?

A. Raw sugar.

Q. In bags?

(Testimony of Stanley Kennedy.)

A. In bags, marked, each plantation having its mark on the bags, a distinguishing mark, either numbers or some letters.

Q. Now was there ever any processing of that sugar that you handled? Was there any refining of it?

A. No. The only refinery that I know of in these Islands is at Honolulu Plantation on this Island.

Q. And you carried none of that sugar from that plantation?

A. No, sir.

The Court: Or any of the sugars from the other plantations for shipment to the Honolulu refinery?

A. No, sir.

Q. Now, Mr. Kennedy, will you briefly tell the Court the [196] practice and the mechanics of picking up sugar and bringing it to Honolulu for transshipment to the mainland?

A. On certain of our routes we had regularly scheduled steamers that would each week call at the various sugar ports. We would be advised by their agents in Honolulu to pick up a certain amount of sugar per week, that they in turn,—or they would at that time give us information as to where that sugar would go upon its arrival in Honolulu, or in some cases advise us of it before the steamer would arrive in Honolulu, we would get the information as to where it would go. This information would advise us as to whether we would discharge that sugar onto the railroad wharves in Honolulu, into Matson steamers in Honolulu, onto our own terminal wharf,



(Testimony of Stanley Kennedy.)

or to other occasional wharves where the Oceanic line steamers at that time picked this sugar up;—certain Western sugars went via the Oceanic vessels, the old Oceanic steamers, the Oceanic Steamship Company; Sonoma, Ventura and Sierra.

Q. Handing you Exhibit "AA", have you checked off the plantations for which you carried sugar to Honolulu?

A. I have.

Q. Those pencil check marks on that exhibit.

A. I have not gone through the whole,—that is up through 1929; that is, as to the sugar.

Q. Have you checked up the names of the plantations?

A. I have checked over the names of the plantations, yes, sir.

Q. Now what are the plantations on the Island of Hawaii that you used to pick up sugar from for transshipping to the mainland? [197]

Mr. Cades: In the interest of saving time,—I don't want to object, but do you mean where they carried the entire crop or any portion of the crop, or two bags, or what do you mean by the question. When you say "plantations for which you have carried sugar," do you mean carried one bag or carried their entire crop?

Mr. Anthony: I think they carried their entire crop, but I think that would be definite, by the evidence.

A. On the Island of Hawaii we brought in sugars from Paauhau plantation, and the Pacific

(Testimony of Stanley Kennedy.)

Sugar Mill, Honokaa Sugar Company, from the Kona Development Company, Kailua; the Hutchinson Sugar Plantation, shipping from Honuapo, and the Hawaiian Agricultural Company, shipping from Punaluu.

Q. Did you carry the entire crop of these respective plantations?

A. To my knowledge, we did.

Q. If you know?

Mr. Cades: I will have to move to strike that. I do not think that he is in position to testify to this unless he can testify that there was a contract to carry that.

(Argument)

The Court: Checking in an approximate way, at least, Mr. Kennedy, over the exhibit, the statistics that you have there, can you give any evidence from your knowledge as to whether that represents the approximate amount—

A. I certainly can, yes, with my close contact with the operations of the company and the handling of our steamers, I do know that the sugar that we brought in from the plantations that I so mentioned has been practically the [198] entire crop; maybe a few bags here and there that were kept by the plantation stores, for their own plantation stores, but other than that I would say that it was the entire crop.

Q. For example, Mr. Kennedy, take Paaupuu plantation, how would that plantation get its sugar to the mainland of the United States if it was not

(Testimony of Stanley Kennedy.)

sent by Inter-Island vessels over the years in question?

A. Well, it could not under the present,—or, under the present conditions that exist on that Island there is no other means. We are still carrying Paauhau sugar to Honolulu for transshipment to the mainland.

Q. Now are there any of the plantations on the Island of Maui for which you were handling sugar?

A. On the Island of Maui we carried sugar from the Olowalu plantation, from the Kaeleku sugar plantation at Hana, and Kipahulu, a very small plantation, as reported.

Q. On the Island of Kauai?

A. On the Island of Kauai we carried sugar in these years from Gay & Robinson; Makaweli; Waimea Sugar Company, and Kekaha Sugar Company, out of the port of Waimea, and the Kilauea Sugar Company from the port of Kilauea.

Q. Did you carry the entire crop of those plantations?

A. To my knowledge we carried the entire crop of those respective plantations.

Q. Those plantations that you have been testifying to?

A. Those plantations that I have been testifying to, that we carried the sugar.

Q. Now all that sugar was ultimately deposited and transshipped on overseas vessels to the mainland of the [199] United States?

A. Yes, sir.

(Testimony of Stanley Kennedy.)

Q. So that none of it in fact was sold, nor could it have been sold, in the Territory of Hawaii, is that correct, for use in the Territory of Hawaii?

A. For use.

Q. Until it was refined?

A. Until it was refined.

Q. Now, Mr. Kennedy, take the business of the Hawaiian Pineapple Company from the year 1922 to 1929, are you familiar with the development of Lanai City.

A. I am very familiar with it.

Q. Did your steamers ever carry any materials that were transshipped from overseas vessels?

A. Considerable of it.

Q. To Lanai City?

A. Yes, sir. We carried, during those years, practically all of it.

Q. The development of Lanai City, or the Island of Lanai, by the Hawaiian Pineapple Company, was one of the major undertakings of this Territory, wasn't it?

A. That is during that period in 1924 and 1925, through to 1928 and 1929.

Q. Did the Matson steamers and other overseas vessels call at the Island of Lanai during these years?

A. On one or two occasions, in the very latter part of that period, in 1928,—1929.

Q. So that anterior to 1929 the only steamer service was by the Inter-Island?

(Testimony of Stanley Kennedy.)

A. The Inter-Island Steam Navigation Company. [200]

Q. Do you recall the items? What particular items do you have in mind that you picked up from overseas vessels or on the docks deposited by overseas vessels, for transshipment? Just give us some of the items?

A. I could enumerate some of the main products or the main lines of those commodities of freight that we took over.

Q. Yes.

A. Mulch paper, coming from the mainland, carried by our steamers upon discharging of that commodity in Honolulu; a considerable amount of feed stuffs and grains for the Island of Lanai was also carried; a tremendous amount of asphalt, transshipped from mainland vessels, for the building of their road system, and for the building of considerable of their public works developments on the Island; their trailers, and in fact the entire transportation on that Island, we carried all of that freight, all of it having been ordered through or having come from the mainland for transshipment to the port of Kaumalapau. Lumber shipments, tremendous lumber shipments, would be sent for or ordered and which were carried direct to,—not direct, but after loading here, were carried to Lanai.

Q. Will you just give the Court somewhat of an idea of how that transshipment was made, the mechanics of that operation; *how would* order you to do what, and what would you do?



(Testimony of Stanley Kennedy.)

A. Well, the general procedure would be that the Hawaiian Pineapple Company would advise me, my man in the office, and at the same time Captain Martin, our port superintendent,—our port captain, to the effect that arriving by [201] such a Matson steamer, say the "Maunalani" or "Matsonia," on next Tuesday, would *by* five thousand rolls of mulch paper, and they would request that we send a steamer alongside of the wharf onto which it was discharged to load and take to Lanai, the thought and the whole idea being the saving of transfer charges to our docks, and with sufficient amounts offering we would put our steamer across the harbor to other docks to get it off the wharves and save the consignee additional trucking charges in Honolulu. The same was true of other commodities such as I have mentioned because in many cases advance information had to be given to our operating department in order to facilitate the transshipment of these commodities to the Island, because our steamers on many of those occasions were on regular schedules, carrying a certain amount of regular freights, and then to have these larger shipments come in from the mainland would sometimes necessitate the scheduling of special steamers for the hauling of this freight to the Island in addition to carrying considerable of the freight in the regularly scheduled boats.

Q. Now, Mr. Kennedy, have you transshipped articles for the various sugar plantations in the

(Testimony of Stanley Kennedy.)

same manner that you have described in reference to the pineapple company?

A. Yes, we certainly have.

Q. Now you have no records, have you, as to segregating your local business, your purely local business, from the gross receipts that you have derived from transshipment from overseas vessels?

A. We do not keep our books in that way, that is, to have [201] a segregation of what was ordered from the mainland and what originated right here in Honolulu.

Q. You have never been requested to keep your books in that manner, have you?

A. No, sir.

Q. Now is it possible to give to the Court absolute mathematical figures of the amount of tonnage or gross receipts from the tonnage on your items transshipped either from the mainland of the United States going to the various outside ports, or from the outside ports of this group, via Honolulu, to the mainland of the United States? Can you give them?

A. No, I cannot.

Q. Now how long have you been there, twenty years?

A. I have been in service just a little over 20 years. I started in 1913.

Q. From your twenty years' experience, and calling your attention particularly to the years 1922 to 1929, are you able to give us an estimate of the gross receipts the Inter-Island derived from transshipment to overseas vessels, either from the main-

(Testimony of Stanley Kennedy.)

land of the United States via Honolulu to the smaller ports, or from the smaller ports via Honolulu to the mainland of the United States and foreign countries?

A. Why, I can.

Q. And what is your estimate, Mr. Kennedy?

A. I estimate that at least 75% of our total freights, in and out, is transshipment freight.

Q. Now, Mr. Kennedy, you are aware, are you not, of the fact that T. H. Davies, for instance, does a large grocery [203] business, or general merchandising business?

A. Yes.

Q. In arriving at your estimate have you taken into consideration the items of general merchandise and groceries, and items of that nature, which you carry from the port of Honolulu to the outlying ports?

A. Yes, I have; I know that considerable of the freight that certain of the factors ship to outside ports comes off of their shelves. That is, you take,—I would say that 25% of the volume comes from local,—that is, locally, is shipped locally.

Q. And in arriving at that 75% figure you are not including items such as may be brought down here to Honolulu and sold and distributed at various and varying prices by the purchaser here in Honolulu and ultimately transshipped on your boats?

A. No, I am not. My estimate of 75% is on freight that comes down in volume, but not coming

(Testimony of Stanley Kennedy.)

down on weekly shipments from the mainland to outside ports; it must be borne in mind that the transshipment,—that the outside ports have been developed considerably in the last three or four years, and up to that time although sugar has been loaded in some of those out-ports direct for the mainland, that does not mean that inward freights to those same ports are not carried by our vessels,—that is, from the mainland, because of the fact the Matson service to some of those out-ports was on a schedule of once in four or five weeks. Now the plantations have their requirements, though, which would necessitate ordering commodities for shipment from the mainland on a weekly basis to [204] Honolulu, on Matson ships, and they would then go forward on our steamers to some of these outside ports, the plantation not being able to wait for a month for some of that service.

The Court: Q. What I understand from your last figures, so as to get the meaning clear at this point, Mr. Kennedy, when you estimate 75% of your business being involved in straight transshipment stuff, that does not take into consideration, but excludes from your estimate, stuff that is unloaded in Honolulu and is taken to Honolulu individual warehouses and might get back into shipment to the outside Islands through other sales?

A. I am excluding that from my 75%. I am including, however, freight that comes down and is discharged on the various local docks here and then is picked up by our vessels.

(Testimony of Stanley Kennedy.)

Q. But through freight, by way only of discharge here for the purpose of immediate transshipment?

A. Yes. I can state an instance there where cargoes of lumber, totaling five hundred thousand feet, would come forward, having been ordered by a plantation, where a certain plantation would have decided to develop and build new camps, where they could estimate their requirements,—that is, they could buy cheaper by getting a complete load of lumber,—a load of lumber, say, approximating five hundred thousand feet, and that lumber in many instances would come down and be discharged either on Pier 2 or preferably on our terminal site there, where we would piece-meal pick it up on our steamers, the shipment being in excess of what our steamer could carry in one full load. [205]

Mr. Cades: I understand that my objection is continuing, and runs to the entire line, and that an exception is taken.

The Court: The objection is taken to the whole line, and exception.

Q. Mr. Kennedy, I want to call your attention particularly to an item of sugar bags. Does your company ever transship any sugar bags?

A. We do.

Q. Where do they come from?

A. The sugar bags come from India. They are ordered—

Q. I am not asking you for the mechanics of the ordering, but what do you do after they arrive here?

A. We transship them, or ship them on our



(Testimony of Stanley Kennedy.)

vessels in the original package that they have arrived in.

Q. How do they come?

A. They are baled. They are compressed, you see, in order to give an economic measurement, and they have got these hoops around them, and that is the manner in which they come. They are about the size of this desk top.

Q. Where do you get them?

A. We pick them up at the various piers, and in some places they are trucked by the shipper to our piers, if we are not able to get them. Take for instance the Dollar boat, or a N. Y. K., or, formerly a T. K. K. boat, would be coming in from the Orient, and would have had transshipped from Calcutta or from India,—and they generally transship them, I think, at Hongkong or some place in the Far East, and comes with a load of bags, and these bags would be discharged generally on Pier 7, which is the Oriental,—or one of the Oriental piers [206] here, and if we could do it, if the shipment was large enough to warrant the moving about of our vessels, and there was an available berth at the said wharf, we would then go to that wharf and pick up the freight, saving, of course, the cartage charge for the consignee. If we could not do that these bags would be carted by the consignee over to our piers, 12, 13 or 14, where they would be transshipped on the Inter-Island steamers, and in some instances over to our terminal where we have departures occasionally.

(Testimony of Stanley Kennedy.)

The Court Q. These things you have just been talking about are part of the 75% estimate that you gave?

A. Oh, yes, the 75% estimate includes the entire sugar crop that we have handled, that we handle, the sugar bag crop, and I could cite numerous articles besides such sugar and bags that make up this,—lumber in tremendous,—in large quantities, that we have carried; mulch paper in large quantities, nitrates coming in from foreign ports, and discharging generally over at our terminals where our vessels would pick them up, either directly or from our terminal wharf on which the freight had been discharged. Tin plate for the canneries, coming in,—not from the Far East but from the Eastern coast, for the canneries on the other Islands. The American Can Company during this period set up their own little can plants, their own plants within each cannery on the other Islands, and just as soon as that happened we had to transship all of this tin plate from Honolulu to these outside ports at which the canneries were located. Then there is cast-iron and galvanized pipe; box shooks for the pineapple industry. That is, now a majority of the canned pineapple goes forward in cartons, [207] paper cartons, but in that period practically all the shipments were made through the wooden box shooks, which come down from the Northwest and were transshipped generally from the Matson ships to our ships for delivery to the outside Island port. Lime,

(Testimony of Stanley Kennedy.)

in quantities, previous to the further development of the Waianae Lime Company here, came forward, and we took those to the other Islands. We have lots of other articles. These are some of the items that I just can cite right now. There was grain stuffs and hay and all of that.

(Recess)

Mr. Cades: Perhaps this case might be somewhat shortened by a stipulation as to a few of these facts. There is apparently no dispute about the kind of gross receipts that there are here; and I think it would save both the time of the Court and of counsel to get together on most of these items, subject to check as to the 75% being correct.

Mr. Anthony: I would prefer to have the evidence in the form of testimony of the witnesses, rather than as a stipulation.

The Court: We will take a few minutes more recess, and then proceed.

(Recess)

Q. \*Mr. Kennedy, can you tell us how long that course of delivering or shipping sugar from the Hawaiian Islands for refining on the Mainland of the United States has been in existence here?

Mr. Cades: I will object to that as vague. Do you refer to the practice of shipping through the Inter-Island?

Q. No, I mean the refining on the mainland?

(Testimony of Stanley Kennedy.)

A. Since the inception of the sugar business in these Islands.

Q. And that has been how many years, about, roughly?

A. Fifty years.

Q. Before you were born?

A. I would say so, yes.

Mr. Cades: Q. You mean Hawaiian sugar has been refined on the coast for 50 years, is that what you testified to?

Mr. Anthony: Yes.

A. You better put in the East coast there too, because it used to go to the East coast.

Q. Mr. Kennedy, is it a fact that the only reason that this freight was transshipped from Honolulu to these outer ports, and transshipped from the outer ports to Honolulu, was that the larger vessels did not call at these out-ports, is that correct?

A. Yes.

Q. And this 75% of your gross freight that you have referred to is all part of a continuous journey for items destined for the mainland of the United States?

A. The mainland and other foreign ports to other ports in the Islands.

Q. Either incoming freight or outgoing?

A. Or outgoing; passing through Honolulu.

Q. Now these items that you have reference to, coming within your 75% estimate, was there any processing ever done on those items in Honolulu

(Testimony of Stanley Kennedy.)

before they were transshipped to the Mainland or going the other way?

A. In Honolulu?

Q. Before they were transshipped by you to the outside ports? [209]

A. There was some processing done to some of the freight that came in, but that was not included in my 75%. Some of it is done. For instance, some fertilizers, nitrates, go up to the P. G. factories, but I am just figuring the nitrates that were transshipped into our vessels alongside of the nitrate ships that came in, or that we picked up on wharves in the harbor of Honolulu.

Q. That is, these items that you have carried were in the same condition when they reached their ultimate destination in the Mainland as they were when you picked them up on the outside ports, is that correct?

A. True.

Q. And, vice versa, the items that you transshipped from Honolulu to the outside ports were in the same condition when they left the mainland of the United States as when you delivered them to the outside ports via Honolulu?

A. Yes, sir.

Q. And the only reason for a break in the transit was the larger overseas vessels did not call at these outside ports, is that correct?

A. Correct, yes.



(Testimony of Stanley Kennedy.)

Cross Examination

By Mr. Cades:

Q. Now this 75% that you have been talking about is, of course, 75% of the freight, of that character; you are talking about freight? Is that correct?

A. Talking about the freight.

Q. And it was stipulated in this cause, as you may know, that there were certain gross receipts during the years in question by your company (handing paper to the witness), [210] and I will show you a stipulation that was entered into in this case wherein it is recited that the gross income derived from the business of the defendant as a common carrier were the figures set forth in the statement. Now it appears in here that one million eight hundred sixty-eight thousand odd dollars was received as a gross income. Do you know what percentage of that, or what part of that, was made up by income received from passenger traffic?

Mr. Anthony: I have exhibits on all of that, which I will put in by the next witness; a breakdown of the passenger and freight items. I have it here, but I will put it on with the next witness.

Mr. Cades: With that understanding, I won't go into this line of inquiry. I think it is necessary to have that broken up.

Mr. Anthony: Oh, yes. We had a lot of work done on that.

(Testimony of Stanley Kennedy.)

Q. Now you say that this 75% then is a percentage of the income received from freight transshipped to the mainland or to and from the mainland of the United States and to and from foreign countries?

A. Yes.

Q. I understood you to say at one time that the shipments to and from foreign ports was a very small item. Can you give any approximate idea what percentage of that is of freight to and from foreign ports?

Mr. Anthony: Speaking of "foreign" as not being in the United States?

Q. Yes, meaning countries other than the United States.

A. No, I can and I can't. I know that bale bags make up a small percentage of our total. We have nitrates, that I [211] would say make up that entire item, the equivalent of what we get in bale bags.

Q. Go to the total of that?

A. Yes, and cement coming in. I didn't mention cement, in stating some of the articles that do come in, but cement is another article that came in in the early part of that period. In the early part of this period, cement came in from Belgium, Sweden and Norway, and was put off on our dock, considerable of which went, after being unloaded here, to the other Islands, but ap-

(Testimony of Stanley Kennedy.)

proximately 50% of that was transshipped in Honolulu, that is by the agencies that purchased a cargo. For instance, they would purchase an entire cargo, approximately six or seven thousand tons in a shipment, and we had several of these ships.

Q. I was presenting to your attention directly, more to this point: Your figure of 75% is an approximate figure?

A. It is an estimated figure.

Q. Can you give the Court some idea how you arrived at that figure?

A. Simply from being in close touch with the constant operation of our company, both with the operations in the freight department and in the accounting, and watching things and discussing with our operating personnel, and our terminal, being in touch with the terminal, and the supervision of our terminal, the terminal being a project that we had put in in 1920 at a tremendous cost to the company, and naturally I was very much interested and watched it carefully to see the revenues that we would derive from the passage of freight over that terminal, and through that constant watching I was able to estimate,— [212] to make an estimate of our total tonnage.

Q. But the figure might be, for any particular year,—it might be more or less than 75%, isn't that correct? It is not a constant figure, is it?

A. I would say that 75% is the constant figure.

Q. Do you mean for each year that it is approximate?

(Testimony of Stanley Kennedy.)

A. The business as a whole, the sugar industry as a whole, has been increasing,—that is, in production. We have come up from six or seven hundred thousand tons production in the early '20's to a million tons here in the last three or four years. That means increased tonnage in and out of the Territory.

Q. I understand that, Mr. Kennedy. Mr. question is simply this: I just want to know what you are testifying to that is 75%. Is it this, that approximately 75% each year of your freight receipts are derived from the kind of commerce you have described in your direct testimony?

A. Yes.

Q. Would you say that figure does not vary very much from year to year?

A. I would say it does not vary.

Q. Of that 75%, using the same dates you have been using before, how much of that 75% is derived by material going to or coming from foreign countries, and by "foreign countries" I mean countries other than the United States?

A. Oh, 10 to 15 per cent.

Q. Ten to 15 per cent.

A. Yes.

Q. In your direct testimony you said that very often it was necessary for you to depart from your regular schedules [213] carrying regular freight and supplied boats for the purpose of picking up sugar here and again?

A. Yes, that is true.

(Testimony of Stanley Kennedy.)

Q. By that you mean that these were extraordinary services that were given to transshipping?

A. No. I would like to give an instance, as an example. I would cite the Hawaiian Agricultural Company at Punahou. We had a steamer at that time that would make weekly trips, or a trip every ten days, the old Mauna Loa. Now we had a sort of a rambling freight boat that would ramble around between ports, picking up cargo here and there. Brewer & Company, who were agents for that plantation, would get an allotment. In other words, they would get an allotment for space on one of the Matson boats that goes out of here,—they have a quota set up for each agency for the ship, allowing each agency so much sugar; it is a pretty constant figure. Now, Brewer & Company will have so much for this certain ship that is going away, and they want to make a transshipment, otherwise that sugar might have to go into storage, which would cost them 35 cents per ton per month. They would ask us as a special favor to send up a ship to get that, and those are the cases that I mentioned.

Q. But besides this freight that you carry, which you have described in your direct examination, you hold yourselves out to transport between the ports in the Territory any material that is offered to you by any given shipper, isn't that correct?

A. Yes, sir.

Q. And you, of course, post your rates that are the same [214] for all people, indicating the rate



(Testimony of Stanley Kennedy.)

at which you are willing to carry freight between ports?

A. Those are all forwarded and approved by the United States Shipping Board:

Q. And this shipment of sugar and other commodities for transshipment are commodities that come to you, into your company, in the usual course of your business as a common carrier, that is correct, is it not?

A. Yes, sir.

Q. None of your boats call at ports other than ports on the Islands of the Territory of Hawaii, is that correct?

A. Other than in the Territory,—not in regular service. That is, we have purchased vessels in this period, had vessels sent over to us, and they have brought cargo out from the mainland to Hawaii during this period.

Q. But you don't purport to act as a carrier for ports other than Hawaiian ports, that is correct, isn't it?

A. We act as a carrier for freights that we know are going to points beyond Honolulu.

Q. I understand, Mr. Kennedy. I was not trying to trick you in to anything.

A. We are a local company, yes.

Q. Your service is restricted to ports within the Territory of Hawaii, isn't that a correct statement?

A. At Present. It has been, yes, but we are not restricted to it.

(Testimony of Stanley Kennedy.)

Q. No, but I mean during the years in question you pur-orted to serve ports in the Islands?

A. Within the Island group.

Q. Leaving out any question as to the kind of commerce? [215]

A. (No response)

Q. That is correct, is it not?

A. Yes.

Q. You don't have a practice of issuing through bills-of-lading, do you?

A. A practice,—no, that is, we ourselves, as to the issuing of bills of lading.

Q. In every case the bill of lading that you issue simply guarantees shipment to the port of Honolulu, or—I refer now specifically to the dealings that you have described in your direct examination, which you state are transshipments?

A. Yes.

Q. In those cases your bill of lading simply guarantees safe delivery at the port here in Honolulu, is that correct?

A. Correct.

Mr. Cades: With the understanding that these figures will be further broken down by other witnesses, I have nothing further, but I do want to bring out sometime during this examination the fact that these gross receipts,—the percentage that is covered by passenger traffic.

(Testimony of Stanley Kennedy.)

Redirect Examination.

By Mr. Anthony:

Q. Mr. Kennedy, do you know whether or not the sugar plantations on the outside ports ever ordered you to pick up sugar there without knowing the approximate time when the overseas vessel was going to take it from Honolulu, or did they on all occasions know within a reasonable time when it was going to be picked up here?

A. Well, as stated before, there were times when we would [216] get a request for a certain amount of inward cargo, and at the time the order would come in to pick up so much tonnage we would not always have the information as to where that cargo was to be discharged, the agents advising us in many instances that before the ship arrived in Honolulu that they would give us that advice.

Q. Before the Inter-Island ship arrived in Honolulu you would be advised?

A. Yes, they would advise us as to the discharge. There were some times, though, that the Matson people were unable to give the consignees that particular information, as to what ship might pick it up. For instance, the Western sugar goes to a different refinery than the Crockett sugar, and the Western tonnages are small compared to Crockett's. The available ships for Western tonnage are less in number than Crockett, and in instances where Western sugar was brought to Honolulu there might be a little longer delay on our docks, or on other docks in the city, before it would be trans-

(Testimony of Stanley Kennedy.)

shipped to San Francisco for Western Refinery delivery.

Now, Mr. Kennedy, the Inter-Island is under the jurisdiction of the Shipping Board, I believe you referred to?

A. Yes, sir.

Q. Will you briefly tell the Court the things that you have to do pursuant to Federal regulations? What is regulated?

Mr. Cades: I will interpose an objection, a special objection, to this. This is a little aside; he is going off the subject now, the quality of these gross receipts, and now seeks to have the witness state as a matter of law the things that they are required to do. [217]

(Argument.)

The Court: The Court will sustain that objection. If there is anything as to the jurisdiction of the Shipping Board, it requires a reversal *unstays*, and when so advised by the proper Appellate Division that that is the situation, then it is time enough to go into it.

Mr. Anthony: I would like to make an offer of proof in support of this question here: That the defendant is under the complete jurisdiction of the United States Shipping Board and other Federal statutes; that the Federal statutes regulate the kind of steamers that the defendant shall operate, the character of the personnel, the equipment, the tariffs,—in fact, everything down to the most min-

(Testimony of Stanley Kennedy.)

utest detail is completely regulated by Federal agency.

Mr. Cades: To your offer of proof we object on the ground that its states conclusions of law; that it is not a matter of fact, and the law can be read; it is all contained in the United States Code, and the Code itself demonstrates that it is not a complete regulation.

Mr. Anthony: I wish to offer further to prove that the United States Shipping Board does in fact regulate the business of this defendant in the manner prescribed by the Statute, and promulgates its regulations; that the rates of this defendant are in fact regulated by Federal agencies, and the tariffs are promulgated periodically, and that this defendant is under complete regulatory jurisdiction of Federal agencies.

The Court: The same ruling to the offer of proof.

Mr. Anthony: To which we note an exception, your Honor.

The Court: Exception allowed. [218]

Q. Now, Mr. Kennedy, there is a Bureau of Steam investigation,—steam inspection?

A. Steamboat Inspection.

Q: A Bureau of Steamboat Inspection, and they maintain an office in Honolulu?

A. Yes, sir.

Q. Are your boats ever inspected?

A. Regularly.



(Testimony of Stanley Kennedy.)

Mr. Cades: If your Honor please, I want to interpose an objection to this line of examination, in the same way. At the time the case was submitted to the Supreme Court a complete survey of the Federal statutes was made with the idea of showing that no Territorial jurisdiction had been ousted by Federal statutes, and I do not think these are the kind of matters that should be gone into at this time.

Mr. Anthony: It has a bearing, in this way: We propose to show what the extent of Federal regulation and inspection is, and that will have some bearing, your Honor, in arriving at a conclusion as to whether this four thousand dollars per annum demanded by this Commission is excessive or arbitrary. For instance, if two Federal agents can investigate all the steamships that come into this port, foreign and domestic steamers, and if they can complete an investigation of all shipping in and out of this port, then it would have some bearing on the question of whether or not four or five thousand dollars is a reasonable fee for the public utilities commission to go down to examine the books of this company to see how much they owe them.

The Court: The objection will be sustained. An exception is allowed. [219]

Mr. Anthony: I would like to make an offer of proof later in the hearing, your Honor.

Q. One more question, Mr. Kennedy: That 75% that you have referred to is an approximation, is

(Testimony of Stanley Kennedy.)

that a minimum figure for each year that you have testified to?

A. Yes.

Mr. Cades: Q. Do I understand by that, by "minimum figure," that at no time during the years 1922 to 1929 did the freight received per annum average less than 75%?

A. Transshipments.

Q. Transshipments. Is that correct?

A. That is my estimate, yes.

The Court: Q. I understand that to mean you are trying to be conservative in your estimate?

A. Yes, I think I am.

(Witness excused.)

---

HENRY S. TURNER,

was duly called and sworn as a witness for the defendant herein, and testified as follows:

Direct Examination.

By Mr. Anthony:

Q. Your full name, please.

A. Henry S. Turner.

Q. And you are employed by the defendant?

A. I am.

Q. What is your position there?

A. At the present time I am treasurer.

Q. How long have you been with the company, Mr. Turner?

(Testimony of Henry S. Turner.)

A. Since January 1st 1925.

Q. And what have been your duties, roughly, since that time,— [220] briefly?

A. I was employed as cashier originally, and made treasurer on,—in the middle of 1932.

Q. And at the present time are the books and records of the company in your custody and control?

A. They are under my supervision.

Q. Under your supervision?

A. Yes.

Q. Now, at my request have you prepared a segregation of certain revenues from the Inter-Island vessels for the years 1922 to 1929, inclusive?

A. That's right.

Q. I hand you a statement there. Were these figures prepared under your supervision and control?

A. They were.

Mr. Cades: Your Honor, I would be perfectly willing to stipulate that,—subject to check,—that these are the figures,—that the figures that have been handed to the witness are the figures reflected by their books showing the segregation of gross revenues between the years 1922 and 1929 as shown by the tabulation.

Mr. Anthony: We offer this in evidence then, your Honor.

The Court: It will be marked "BB".

(Document offered in evidence received and marked: "Defendant's Exhibit BB.")

(Testimony of Henry S. Turner.)

[Defendant's Exhibit BB, here introduced is set forth in this printed transcript at page 73.]

The Court: That is entitled: "Inter-Island Steam Navigation Company. Segregation of certain revenues included in vessel gross revenues for the years 1922 to 1929," carrying as subheading columns, "Vessel revenues gross, exclusive of tugs and barges; sugar freight for transshipment to [221] mainland; U. S. Mail Revenue;" in another column, "other U. S. government accounts," and in another column, per year, "Total sugar and U. S. accounts," and in another column, per year, "Percentage of sugar and U. S. accounts to total revenue."

Mr. Cades: My stipulation would go for that, but I have in mind—

The Court: This will be marked "BB" for the purpose of illustrating a way of looking at the gross revenue.

Q. Now, handing you Defendant's Exhibit "BB," you have arrived at the figures set forth in that exhibit from the books of the company, is that correct?

A. Yes.

Q. And take, for example, the sugar revenue, all the revenues from sugar which you have listed there, as 13% of your total gross revenue from freight, will you tell the Court how you arrived at that?

A. These figures were arrived at from statistical records kept by the company.

(Testimony of Henry S. Turner)

Q. Statistical records showing what?

A. Showing classifications, revenues derived from various classifications of freight.

Q. And those statistics, how long have you had those in effect? How long have you been keeping statistics of that nature; just approximately?

A. Well, for a period considerably prior to the period under consideration. I don't know, off-hand, how long they have been keeping them.

Q. Now your next item there, U. S. Mail Revenue. You have taken that from the books of the company, is that correct? [222]

A. That is taken directly from the books of the company, because of the fact the mail was carried under a contract.

Q. Now you have "Other U. S. Government Accounts,"—that is shipment of passengers and freight for the United States of America, and for Federal agencies generally?

A. That is true.

Q. Now your percentages, Mr. Turner, underneath "sugar freight for transshipment to mainland," 13%, does that mean 13% of the total gross receipts, passengers and freight, or just 13% of the freight?

A. Thirteen per cent. of the freight.

Q. Now in your first column you have "gross revenues from vessels,—"

A. Wait a minute. I think I am wrong on that. It is 13% of the gross.



(Testimony of Henry S. Turner.)

Q. From passengers and freight?

A. Yes, from passengers and freight.

Mr. Cades: Q. In other words, that is the 13% of the first account?

A. The first figure.

Q. And those following percentages are simply percentages of the total gross revenues from your vessels?

A. Yes, gross revenues, the percentages.

Q. From your public utility business?

A. Yes.

Mr. Anthony: Q. Now I hand you another tabulation entitled: "Inter-Island Steam Navigation Company, Ltd. Segregation of gross revenues as between passenger, freight, for the years 1922 to 1929," inclusive,—Was that made under your direction?

A. Yes. [223]

Q. And supervision?

A. Yes.

Q. And are you prepared to say that the segregation is an accurate segregation?

A. It is.

Mr. Anthony: We offer that in evidence, if the Court please.

The Court: It will be received and marked "CC".

(Document offered in evidence received and marked: "Defendant's Exhibit CC.")

(Testimony of Henry S. Turner.)

[Defendant's Exhibit CC, here introduced is set forth in this printed transcript at page 74.]

Q. Mr. Turner, at my request have you examined an exhibit prepared by the auditors of your company, Young, Lamberton & Pearson, with reference to the taxes paid by this defendant over the years in question?

A. Yes, I have.

Q. Have you checked that with the books of the company?

A. Yes.

Q. And that certificate is correct; those items have been paid on account of property taxes and income taxes by the defendant?

A. That is true.

Mr. Anthony: We offer that in evidence, if your Honor please.

Mr. Cades: Your Honor, I will object to the admission of this specifically. Of course it is covered by my demurrer. This purports to be a statement of income taxes and property taxes and other taxes paid by the Inter-Island to the Territory. My objection is specifically made on the ground that the statute does not purport to exempt public utility carriers who paid other Territorial taxes from the provisions of Section 2208, under which we are proceeding, and to the admission of this compilation as irrelevant and immaterial. [224]

Mr. Anthony: The only purpose of this, your Honor, is so that when we get in the Appellate

Court we will not be met with the argument that possibly this is in lieu of taxes. I want it to appear plainly that not only are we liable for all taxes, but we have in fact paid them over the years in question.

(Argument.)

The Court: As I understand it, the attitude of the Territory is it is not a taxable proposition; that the defendant in this cause is not paying any other taxes,—but the Court would have to go on the assumption or the conclusion that this defendant was paying taxes properly charged against him under any other laws of the Territory, and that being so, I don't see any use in this particular compilation.

Mr. Anthony: I would like to have the facts shown, your Honor. It may be that if we are met, with a further argument in the Appellate Court, that this is really some kind of a property tax, then we will be able to say, in response to that "Why we have in addition to that already paid \$1,600,000. over the years in question, and that lumping that on top as an additional property tax is also arbitrary, and unreasonable.

The Court: The Court would assume, under the law, there being no exemption in the utilities law itself allowing for any credits for taxes paid under any other provision of law, that any operating company of the Territory was being taxed and were paying taxes that were chargeable against them as

property tax-payers and income tax-payers of the [225] Territory, and until the Territory presented the contra argument or basis for argument, at which time the defendant would have an opportunity to meet that with this kind of evidence, that they were not paying or being subjected to other taxes, the Court would go on the assumption that they were paying and were paying in accordance with their position in the community as a corporation receiving income and as a corporation having property in the Territory.

(Argument.)

The Court: The Court will sustain the objection.

Mr. Anthony: Will you allow it to be marked for identification?

The Court: It will be received and marked for identification, "DD."

(Document offered in evidence for identification, was marked: "Defendant's Exhibit DD for Identification.")

[Defendant's Exhibit DD, here introduced is set forth in this printed transcript at page 75.]

Mr. Anthony: At this time, if the Court please, we offer to prove each and every allegation of paragraph 3 of the amended answer, and paragraph 7 of the amended answer.

Mr. Cades: I object to the form of the offer of proof, your Honor. That is not the correct way of

making an offer of proof. If for no other reason than that, it ought to be refused.

(Argument.)

The Court: Well the Court has assumed, Mr. Anthony, that regardless of the amounts thereof, that this defendant is not being taxed by the plaintiff in any way; that this defendant has paid all the property taxes, as an enterprise for profit, which are properly chargeable against it under [226] the laws of the Territory, and that it has paid all income taxes and real and personal property taxes aforesaid which were assessed to and paid by said defendant at the same rate as those assessed to and paid by all other persons, and has ruled that your question is not a material question.

Mr. Anthony: I call your Honor's attention also to the allegations of paragraph 7 of the amended answer, which we are ready to prove.

The Court: The objection to the offer will be sustained, and an exception allowed.

Mr. Anthony: So that there is no mistake in the record here, I understand the ruling of the Court goes not to the form of our offer of proof but to the materiality of any issue raised under these respective paragraphs of the complaint?

The Court: That is correct. That if there was any question about it, the Court would give you ample time to state in detail all the facts. The Court has taken the view that it is immaterial.

(Whereupon an adjournment was taken until 3 o'clock p. m. of this date) [227]



Tuesday, January 9, 1934.

3:00 o'clock p. m.

All parties being present as before, the following further proceedings were had and testimony taken:

Mr. Cades: This is an oral stipulation between counsel.

It is stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that with regard to the gross receipts from through freight traffic, testified to and estimated by Stanley Kennedy to be not less than 75% per annum of the gross freight receipts, the intention of the consignor,—or the consignee, in every case, was to have the commodity transshipped either to the mainland of the United States or from the mainland of the United States and foreign countries in an uninterrupted journey to the ultimate place of delivery; shipments being through Honolulu in every case simply because the larger boats do not stop at the smaller ports of the Hawaiian group, and the commodities are routed through Honolulu solely for the purposes of transshipment, and that in all cases where the journey from ports of the Hawaiian group other than Honolulu, via Honolulu, to the mainland, and vice versa, is interrupted at the port of Honolulu, the interruption is for no independent local advantage, but the interruption of the journey is solely for the purpose of transshipment in overseas vessels, or transshipped on boats of the defendant, the com-

modities being in the same condition as when they are received in Honolulu.

The Court: Is there any other evidence?

Mr. Cades: I would like it understood that this compilation [228] is, of course, subject to the same objection already made to all the testimony, and subject to the motion to strike.

The Court: The Court's understanding of the situation is it is a stipulation that the witness, if called, over the objection of counsel, would so testify.

Mr. Cades: Yes.

Mr. Anthony: That is correct, your Honor.

At this time, if the Court please, I wish to make an offer of proof as to the extent of the Federal regulation of this defendant, and I offer to prove by the witness in the court room, Mr. Stanley Kennedy, that this defendant is under the complete regulation of three Federal agencies, the United States Shipping Board, the Steamboat Inspection Service of the Department of Commerce, and the Post Office Department. The United States Shipping Board in Washington requires this defendant to submit annual reports, being comprehensive and voluminous documents covering the capital structure of the defendant, capital involved in operations, financial statement, list of officers and directors and personnel; that the rate, tariffs, rules and regulations covering shipments of freight and passengers of this defendant, together with all other rules and practices, must be submitted to the

Shipping Board at Washington, D. C., for the approval of that agency before becoming effective. That the Steamboat Inspection Service of the United States of America maintains an office at the port of Honolulu, making a quarterly inspection of all vessels of this defendant and a comprehensive and detailed inspection of each and every vessel of the defendant annually, the latter inspection covering boilers, life boats, life raft [229] equipment, fire protection equipment, all safety devices and appliances,—in other words, a complete physical internal and external inspection of the equipment of this defendant is made by this agency, and that the Steamboat Inspection Service also acts as a Board of Inquiry in cases of accident, meting out decisions and penalties in the case of offending masters of vessels; that the office of the steamboat inspection service in Honolulu issues licenses to officers, deck officers and engineers of the defendant, and has general supervision over the personnel operating its vessels,—the defendant's vessels.

That the Post Office Department, by virtue of Federal regulations, regulates the time of sailing so as to give the best possible mail service by this defendant among the several ports of the Hawaiian group; and that with respect to all accidents occurring to employees of the defendant such employees are wholly without the jurisdiction of the local Industrial Accident Board, but are within and under the Federal jurisdiction pursuant to the Federal

statutes applying to maritime callings. I believe the name of the statute is "The Stevedores and Longshoremen's Act," and also the Jones Act,—Federal statutes. We ask the ruling of the Court on our offer of proof, that we started to make this morning.

Mr. Cades: Just for the purpose of the record, I want to object to the evidence offered to be proved being received in this case: First, because it is an offer to prove matters of law; it is not an offer to prove matters of fact, and in so far as facts are mentioned they are irrelevant and immaterial. He might have offered to prove, for example, [230] that causes of action against these ships apply to Federal Courts only, and that would have the same relevancy as the matters suggested here.

(Argument.)

Mr. Anthony: We would also like to amplify our offer of proof to the effect that we will prove by this witness, Mr. Kennedy, that the Department of Steamboat Inspection Service of the United States of America maintains an office here in Honolulu employing two men and a stenographer and that is for the purpose of inspecting, among other things, these vessels, together with vessels of other lines, and that the total time expended by these men in this office here and the stenographer that has charge of the work is not more than one month per annum in the aggregate.

I take it the offer of proof is rejected, your Honor.

The Court: That is the ruling of the Court. Objection sustained. An exception will be allowed.

Mr. Anthony: I would like to call Mr. Kennedy for further testimony, your Honor.

The Court: You may do so.

### STANLEY KENNEDY

recalled for further examination, testified as follows:

#### Direct Examination.

By Mr. Anthony:

Mr. Anthony: Mr. Cades, I have here,—I don't know whether I furnished you a copy of these figures on the tonnage. I have here the figures showing the receipts from freight on sugar bags in the years 1925 to 1929, inclusive. They are foreign shipments, from India.

Q. Do you know anything about these figures, Mr. Kennedy? [231]

A. I had nothing to do with that.

Q. They were made up by Mr. Turner?

A. Yes.

Mr. Cades: What is the point? We may be able to stipulate on that.

Mr. Anthony: It is only just a question of offering this as an exhibit, in the testimony, is all, in the record, as to the shipment of sugar bags from India to the outports of the Hawaiian group.



(Testimony of Stanley Kennedy.)

Mr. Cades: I will stipulate, subject to check, that the books of the company reflect that the sugar bags spoken about total the amount set forth on this exhibit.

Mr. Anthony: This is confined to the years 1925 to 1929, inclusive.

Mr. Cades: That is all right.

Mr. Anthony: It does not cover the entire period. We don't have figures available.

Mr. Cades: Is that correct? Are these the bags that he was talking about?

Mr. Anthony: Yes, that is correct.

The Court: It will be received and marked "EE."

(Document offered in evidence is received in evidence and marked: "Defendant's Exhibit EE.")

[Defendant's Exhibit EE here introduced is set forth in this printed transcript at page 76.]

Q. Mr. Kennedy, a stipulation has been entered into relative to shipments in the Inter-Island vessels, and we would like to know if you make any shipments from the ports of the Hawaiian group which are transshipped on vessels destined for and in fact reaching a foreign country. Are there any commodities that you carry of that kind, that go to a foreign country?

Mr. Cades: Will you add "of your own knowledge"? [332]

Mr. Anthony: Yes.

(Testimony of Stanley Kennedy.)

Q. Of your own knowledge?

A. There have been occasional shipments.

Q. Such as what items? Pineapple? Do you ever ship that?

A. There have been pineapples come in for transshipment to Oriental ports, the U. K. and other European ports. I recall a shipment of tin-plate,—I mean scrap tin and scrap iron from outer ports *inward* to Honolulu for transshipment to the Orient.

Q. That is, during the period that we are discussing here?

A. That we are discussing.

Q. Have you ever transported any sugar mills or sugar machinery to any foreign country?

A. Yes, we have.

Q. The Philippine Islands?

A. The Philippine Islands and China.

The Court: Q. You mean transported locally, for trans-shipment?

A. Old sugar mills that have been sold. For instance, the Olowalu Mill, just recently, but that does not come within this period,—but the Kona Development sugar mill from Kailua was shipped.

The Court: Q. What my question was,—I think there is a little confusion in the question and answer, at least that confused me,—that you intended to say that it was a shipment from outlying ports to Honolulu for trans-shipment? That is, you did not take it direct to the Orient?

A. For transshipment, yes, sir.

(Testimony of Stanley Kennedy.)

Q. Are you able to give us any estimate as to the amount [233] of such items, or is that—

A. That percentage is so small that it is almost nothing.

**Cross Examination.**

By Mr. Cades:

Q. So I take it, if at all, it would increase your 75%, if it was exactly computed, or would it be included in the 75%?

A. That would be included in the 75%.

Q. You say that very small quantity going to foreign ports would be included in that 75%, of which you have already spoken?

A. Yes, sir.

(Witness excused.)

---

**HERBERT THOMAS MARTIN,**

was duly called and sworn as a witness for the defendant, and testified as follows:

**Direct Examination.**

By Mr. Anthony:

The Court: Is this cumulative?

Mr. Anthony: Yes, your Honor, except that he has been a governmental employee over part of the time in question, and can testify as to bills of lading a little more fully.

The Court: On a point that would be cumulative or corroborative of Mr. Kennedy, perhaps Mr.

(Testimony of Herbert Thomas Martin.)

Cades would stipulate that if he was examined he would, in substance, so testify?

Mr. Cades: I will so stipulate.

Q. What is your name?

A. Herbert Martin,—Herbert Thomas Martin.

Q. You are an employee of the Inter-Island?

[234]

A. Yes, sir.

Q. In what capacity are you there?

A. Port superintendent.

Q. How long have you been employed with the Inter-Island?

A. This is my tenth year.

Q. Before your employment with the Inter-Island what was your job?

A. Pilot and harbor master.

Q. In Honolulu?

A. Yes, sir.

Mr. Cades: If you will state what it is this witness will prove, we will probably dispose with it. We haven't really had an argument on the facts yet.

Mr. Anthony: I think we can get it just as quickly from the witness.

Q. Captain Martin, do you of your own knowledge know whether the Inter-Island has transshipped freight from overseas vessels to various ports of the Hawaiian group?

A. Yes, sir; about 80% of the entire in and out freight that goes out or comes in is for overseas shipment.

(Testimony of Herbert Thomas Martin.)

The Court: What is that, 8 or 80%?

A. Eighty per cent.

Q. Captain, you have had a great deal of experience handling cargoes down there on the docks. Will you just briefly explain to the Court the mechanics of those transshipments?

A. The transshipments would be ordered by the plantation agents. They would be brought here by a Matson, Dollar, Isthmian or Grace line steamer, the agents would notify Mr. Kennedy. "We have got 600 tons," we will say, "of cement", and Mr. Kennedy would notify me,—I am talking now as [235] working for the Inter-Island,—not as harbor master,—and as this cargo would be brought in and discharged on the different docks we would naturally move our ships over and pick that cargo up, and, going back to the harbor-master's job, it is my position then to see that this cargo came through on a through bill-of-lading,—such as, say, 600,000 feet of lumber for Honuapo via Honolulu.

Q. Where is Honuapo?

A. Hawaii. If the words "via Honolulu" was not on there, you see, we would charge demurrage.

Q. You mean the government would charge it?

A. Yes, sir. The words "via Honolulu" eliminates that; by the Board of Harbor Commissioners' rules. The law says then you may take it on the first available steamer. Maybe the Inter-Island vessel left on a Sunday and certain cargo came in on a Monday, and it stayed on the dock for a week, you



(Testimony of Herbert Thomas Martin.)

could not collect a wooden nickel so far as those ships go.

Q. Captain, you recall shippers endeavoring to make as close connections as possible during your time when you were harbor master?

A. Yes, sir; naturally, to save expenses.

Q. To save demurrage and storage charges?

A. Yes, sir, storage charge on the wharves of 75 cents a ton,—it used to be.

Q. Do you recall during your time as harbor master of the Inter-Island boats picking up cargoes directly from the overseas bottoms and taking those off?

A. Yes, sir.

Q. On what character of cargoes would they do that? [236]

A. Oh, they took in everything,—from grain, hay, lumber, shingles, fence posts, cement, lime, mulch paper, sugar machinery, pipes, everything in general; the things that the Inter-Island used to pack was what the plantation man needed, everything that he could not get off the shelf in Honolulu.

The Court: Everything from a tack to a mill?

A. Yes. Some things they buy only annually, and those they will buy in large quantities. They know what it will take to run a plantation for a year. Even today they do not give us any money unless they have to.

(Testimony of Herbert Thomas Martin.)

Q. You do not lose any, Captain, if you can get it?

A. No, sir, we go right out to get it.

Cross Examination.

By Mr. Cades:

Q. How long have you been with the Inter-Island?

A. Me? Ten years now.

Q. So that you got there about 1923?

A. Yes, sir; six and a half years previous to that I was with the Board of Harbor Commissioners, master pilot and harbor master.

Q. When you say 80%, you mean approximately?

A. Approximate. I could not tell you exactly. In these times there would be large quantities of goods going to the Island of Lanai. It wouldn't be anything for us to go along and get five thousand rolls of mulch paper.

Q. Mr. Kennedy gave an estimate of 75%.

A. Yes, but he was in the office, and I was dancing around the water-front.

Q. I was just asking you, Captain, whether it could be 75%? [237]

A. I don't doubt Mr. Kennedy; he has got the figures, and I have to keep mine upstairs. Some of his ships have carried to Lanai some 3500 barrels of asphalt, and we had to take it piece-meal as we had no ships to carry that quantity, and the same thing with lumber.

(Testimony of Herbert Thomas Martin.)

Q. Captain Martin, is it not your testimony that all of these transshipments that you are talking about, of 75%, are carried here on a through bill-of-lading?

A. I am not talking about coming in,—going out. You see the idea was this, to dodge the demurrage. You see, in freight coming from the Coast they all used to watch out for the demurrage. We used to stick them 25 cents per ton, per day.

Mr. Anthony: Q. That is, the Harbor Board?

A. Yes, the Harbor Board. Coming in they pay demurrage on sugar.

Q. In other words, a portion of this 75% is represented by through bills of lading, coming from the mainland?

A. Yes, coming from the mainland.

Q. But sugar going to the mainland is not generally sent on through bills of lading?

A. I never saw anything about bills of lading to the ship. All I know is that we used to bring it in, deposit it at Pier 6, the Inter-Island wharf, and direct to the steamer.

Q. Then you were finished with it?

A. Yes, sir.

(Witness excused.)

Mr. Cades: It has been understood between counsel that Mr. Eaton, the Auditor of the Public Utilities Commission, [238] would check, so far as he was able to, the figures that have been submitted,

and subject to any testimony I might want to offer of his, or a re-examination of Mr. Kennedy, we rest.

Mr. Anthony: We have no objection whatsoever to that, and we will recall the witness at counsel's convenience.

The Court: Do you want to go ahead and submit this, or not?

Mr. Cades: At this time I want the record to show that I now move to strike all of the testimony that has been admitted in this cause, in this present hearing, on the grounds that are elaborated in my special demurrer that has been filed in this cause, and, of course, that is sufficient. And I would suggest that on that motion to strike, if your Honor sees fit, that I be permitted to file a memorandum, and that they be permitted to file a memorandum in support of their contentions.

The Court: I think that should be handled along the line of the entire matter,—what memorandum you want to file,—on the entire cause before me, so we won't get it piece-meal but will get your seriatim position clearly in mind, segregated in such manner as you will be able to do it from your greater familiarity with the record up to date, having in mind that the Court has gotten this in its head piece-meal, while you gentlemen have been working on it assiduously from your respective angles.

(Hearing closed.)

[239]

We, official shorthand reporters of the First Judicial Circuit, Territory of Hawaii, certify that we reported in shorthand the testimony given at the hearings of said cause, and that the foregoing is a true and correct transcript of our shorthand notes so taken as aforesaid, and contains all the testimony given at said hearings.

Dated at Honolulu, May 29, 1934.

WM. S. CHILLINGWORTH,

Pages 1 to 37, inclusive;

LESLIE C. FINLEY,

Pages 38 to 67, inclusive;

R. N. LINN,

Pages 68 to 128, inclusive.

I hereby certify that the foregoing reporters were the official reporters of this court acting and qualified and who took the portions of testimony noted by them.

June 29, 1934.

A. M. CRISTY,

Judge [240]

In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

APPLICATION FOR WRIT OF ERROR.

[Endorsed]: Filed June 29, 1934.

[241]

To the Clerk of the Supreme Court:

Please issue a writ in the above entitled case to the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on behalf of Inter-



Island Steam Navigation Company, Limited, returnable to the Supreme Court.

Dated: Honolulu, T. H., this 7th day of June, 1934.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
SMITH, WARREN, STANLEY & VI-TOUSEK,

By ROBERTSON & CASTLE,

Its attorneys.

Service of a copy of the foregoing Application for Writ of Error is hereby acknowledged this 29th day of June, 1934.

SMITH, WILD & BEEBE,

Attorneys for Public Utilities Commission, Plaintiff, Defendant-in error. [242]

In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

**NOTICE OF APPLICATION FOR WRIT OF  
ERROR.**

[Endorsed]: Filed June 29, 1934. [243]

To the Territory of Hawaii by the Public Utilities  
Commission of the Territory of Hawaii, and  
Messrs. Smith, Wild & Beebe, its attorneys:

You and each of you please take notice that an  
application had been filed this day for a writ of  
error from the Supreme Court of the Territory of  
Hawaii, addressed to the Circuit Court of the First  
Judicial Circuit, Territory of Hawaii. Please find  
attached hereto a copy of the assignment of errors in  
said cause.

29

Dated: Honolulu, T. H., this ~~7th~~ day of June,  
1934.

**INTER-ISLAND STEAM NAVI-  
GATION COMPANY  
LIMITED,**

**SMITH, WARREN, STANLEY &  
VITOUSEK**

**By ROBERTSON & CASTLE**

**Its attorneys**

**By Norman Newmark**

Service of a copy of the foregoing Notice of Application for Writ of Error, together with Assignment of Errors, is hereby admitted this 29th day of June, 1934.

SMITH, WILD & BEEBE,  
Attorneys for Public Utilities  
Commission, Plaintiff, Defendant-  
in-error. [244]

---

2  
In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

**WRIT OF ERROR.**

[Endorsed]: Filed June 29, 1934.

Returned July 10, 1934 at 9:15 A. M.

**ROBERT PARKER, JR.**

Clerk Supreme Court.

Copy received June 29, 1934.

**SMITH, WILD & BEEBE**

1st Circuit Court Territory of Hawaii.

[Endorsed]: Filed Jun. 29, 1934.

D. K. Sherwood, Clerk. [245]

**THE TERRITORY OF HAWAII:**

To the Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

Application having been made on behalf of Inter-Island Steam Navigation Company, Limited, defendant, plaintiff-in-error, for a writ of error in the above entitled case, you are commanded forthwith to send to the Supreme Court the record in said case.

Witness the Honorable Antonio Perry, Chief Justice of the Supreme Court, this 29th day of June, 1934.

(Seal)

**ROBERT PARKER, JR.,**

Clerk of the Supreme Court. [246]

In the Supreme Court of the Territory of Hawaii \_\_\_\_\_  
[Title of Cause.]

**RETURN OF WRIT OF ERROR. [247]**

To the Clerk of the Supreme Court of the Territory  
of Hawaii:

The execution of the within writ of error appears  
by the record hereto annexed.

Dated: Honolulu, T. H. July 10, 1934.

(Seal)

D. K. SHERWOOD,

Clerk, Circuit Court, First Judicial  
Circuit, Territory of Hawaii. [248]

---

In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

**ASSIGNMENT OF ERRORS.**

[Endorsed]: Filed June 29, 1934. [249]

Comes now Inter-Island Steam Navigation Com-  
pany, Limited, plaintiff-in-error above named and  
petitioner for a writ of error in the above entitled  
cause, and says that in the record, proceedings, de-  
cisions, rulings and judgment of the Circuit Court  
of the First Judicial Circuit in that certain action  
at Law, No. 12,809, lately pending in said court,  
wherein The Territory of Hawaii by the Public



Utilities Commission of the Territory of Hawaii was plaintiff, and Inter-Island Steam Navigation Company, Limited, was defendant, there is manifest, material and prejudicial error, and the plaintiff-in-error now makes, filed and brings the following assignment of errors on which it relies, to-wit: [250]

Assignment No. 1.

The court erred in making and entering judgment for the plaintiff (defendant-in-error herein) for the reason that the said judgment was contrary to the law, contrary to the evidence and contrary to the weight of the evidence, which judgment was duly excepted to by defendant (plaintiff-in-error).

Assignment No. 2.

The court erred in making and rendering its decision dated April 12, 1934, in that the same was contrary to the law, contrary to the evidence and contrary to the weight of the evidence, which decision was duly excepted to by defendant (plaintiff-in-error herein).

Assignment No. 3.

The court erred in making and rendering its decision dated April 14, 1934, in that the same was contrary to the law, contrary to the evidence and contrary to the weight of the evidence, which said decision was duly excepted to by defendant (plaintiff-in-error herein).

Assignment No. 4.

The court erred in ruling that the defendant was subject to the provisions of Chapter 132, Revised Laws of Hawaii, 1925, and in entering judgment against defendant accordingly.

Assignment No. 5.

The court erred in failing to rule and enter judgment for the defendant upon the ground that Congress by the enactment of the Act of September 7, 1916, 39 Statutes [251] at Large, Chapter 451, page 728, took over the whole field of the regulation of the business of the defendant as a common carrier by water and vested exclusive jurisdiction in the United States Shipping Board and ousted the Public Utilities Commission of the Territory of Hawaii from jurisdiction over the defendant, including jurisdiction to collect the fees demanded by the plaintiff in its complaint.

Assignment No. 6.

The court erred in ruling that the defendant was subject to investigation by the Public Utilities Commission of the Territory of Hawaii under Chapter 132, Revised Laws of Hawaii 1925, and in entering judgment in favor of the plaintiff in the sum of \$53,435.55.

Assignment No. 7. <sup>⑦</sup>

The court erred in failing to rule that the fees demanded by plaintiff under Chapter 132, Revised Laws of Hawaii 1925, were disproportionate to and bore no relation to the cost of investigating the busi-

ness of the defendant, were arbitrary, unreasonable, excessive, discriminatory and void under the Fifth Amendment to the Constitution of the United States, and in not entering judgment in favor of defendant accordingly.

Assignment No. 8.

The court erred in failing to rule that the fees demanded by plaintiff under Chapter 132, Revised Laws of Hawaii 1925, were disproportionate to and bore no relation to the cost of investigating the business of the defendant, [252] were arbitrary, unreasonable, excessive, discriminatory and void under the Fourteenth Amendment to the Constitution of the United States, and in not entering judgment in favor of defendant accordingly.

Assignment No. 9.

The court erred in failing to rule in favor of the defendant upon the ground that the fees demanded by plaintiff in its complaint constituted an unreasonable burden upon interstate commerce and were therefore in conflict with Article I, Section 8, of the Constitution of the United States, and void, and in not entering judgment for defendant accordingly.

Assignment No. 10.

The court erred in failing to rule in favor of the defendant upon the ground that the fees sought to be collected by plaintiff in its complaint imposed a burden upon commerce between the Territory of Hawaii and the mainland of the United States and foreign countries, in violation of Article 1, Section

8, Clause 3, of the Constitution of the United States, and in violation and in derogation of the exclusive power vested in Congress to control and regulate such commerce, and in not entering judgment for defendant accordingly.

Assignment No. 11.

The court erred in failing to rule in favor of the defendant upon the ground that the fees sought to be collected by plaintiff in its complaint imposed a burden upon commerce between the Territory of Hawaii and the mainland of the United States and foreign countries, in violation of Article 1, [253] Section 8, Clause 18; of the Constitution of the United States, and in violation and in derogation of the exclusive power vested in Congress to control and regulate such commerce, and in not entering judgment for defendant accordingly.

Assignment No. 12.

The court erred in failing to rule in favor of the defendant upon the ground that the fees sought to be collected by plaintiff in its complaint imposed a burden upon commerce between the Territory of Hawaii and the mainland of the United States and foreign nations, in violation of Article 4, Section 3, Clause 2, of the Constitution of the United States, and in derogation of the exclusive power vested in Congress to control and regulate such commerce, and in not entering judgment for defendant accordingly.

**Assignment No. 13.**

The court erred in failing to rule that the fees demanded by plaintiff in its complaint bore no relation to the cost of investigating the business of the defendant, were arbitrary, unreasonable, excessive, discriminatory and void, imposed a burden upon commerce between the Territory of Hawaii and the mainland of the United States and foreign countries in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in violation and derogation of the exclusive power vested in Congress to control and regulate such commerce, and in failing to enter judgment for defendant accordingly. [254]

**Assignment No. 14.**

The court erred in failing to rule in favor of the defendant upon the ground that the collection of the fees prescribed by Chapter 132, Revised laws of Hawaii, 1925, imposed a tax or burden upon the government of the United States of America and upon its instrumentalities in the exercise of its sovereign functions, contrary to the provisions of the Constitution of the United States, and in not entering judgment for defendant accordingly.

**Assignment No. 15.**

The court erred in failing to rule that the tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, could not be levied upon the gross receipts of the defendant derived from the carriage of mails and the performance of services for the



United States of America; and in not entering judgment accordingly.

Assignment No. 16.

The court erred in failing to rule that since the tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, impinged in part upon the doing of business by the defendant for or with the United States of America, as a matter of construction of Chapter 132, Revised Laws of Hawaii 1925, the defendant was not subject to the provisions of said Chapter, and in not entering judgment in favor of defendant accordingly.

Assignment No. 17.

The court, having found that during the years in controversy 75% of the gross receipts for freight carried by [255] defendant as a common carrier were receipts derived from the carriage of freight between the several ports of the Territory of Hawaii to the mainland of the United States or foreign ports, freight originating from the mainland of the United States or foreign ports and carried by the defendant from Honolulu to other ports of the Territory of Hawaii, receipts from the transportation of United States mails and other services directly for the United States of America, and having ruled that without authority traceable to Congress the legislature of the Territory was without power to require the payment of the charges provided in Section 2207, Revised Laws of Hawaii 1925, erred in failing to enter judgment in favor of the defendant.

**Assignment No. 18.**

The court erred in failing to rule that since the gross receipts tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, impinged in part upon the business of the defendant in the carriage of freight as a part of a continuous journey between the ports of the Territory of Hawaii and the mainland of the United States and foreign countries; that as a matter of construction of Chapter 132, Revised Laws of Hawaii 1925, the defendant was not subject to the provisions of said Chapter, and in not entering judgment in favor of defendant accordingly.

**Assignment No. 19.**

The court erred in ruling and entering judgment in favor of the plaintiff upon the ground that Congress by enactment of the Act of March 28, 1916, 39 Statutes at Large, [256] Chapter 53, page 38, expressly adopted the Public Utilities Commission in the Territory of Hawaii as the agent of Congress to investigate, levy fees upon and tax the gross receipts from the business of the defendant in interstate and foreign commerce.

**Assignment No. 20.**

The court erred in ruling and entering judgment in favor of the plaintiff on the ground that the mere existence of the Public Utilities Commission of the Territory of Hawaii was sufficient to warrant the collection of the fees prescribed by Section 2207, Revised Laws of Hawaii, 1925, from this defendant.

Assignment No. 21.

The court erred in failing to rule that such portion of the fees demanded by plaintiff in its complaint, measured by the gross receipts from defendant's business in the carriage of freight as a part of a continuous journey between the Territory of Hawaii and the mainland of the United States and foreign countries, was not subject to the fees or tax provided for by Chapter 132, Revised Laws of Hawaii 1925, and in not entering judgment accordingly.

Assignment No. 22.

The court erred in failing to rule that since the gross receipts tax or fees prescribed by Chapter 132, Revised Laws of Hawaii, 1925, impinged in part upon the business of the defendant in the carriage of freight as a part of a continuous journey between ports of the Territory of Hawaii and [257] the mainland of the United States and foreign countries, and since no distinction between local commerce and interstate or foreign commerce was made or contemplated by said Chapter, that therefore the gross receipts tax or fees as therein provided were totally void under Article 1, Section 8, Clause 3, of the Constitution of the United States, and in not entering judgment for defendant accordingly.

Assignment No. 23.

The court erred in failing to rule and enter judgment in favor of the defendant upon the ground that Section 2210, Revised Laws of Hawaii 1925, expressly excluded the interstate and foreign com-

merce of the defendant from the provisions of Chapter 132, Revised Laws of Hawaii 1925.

Assignment No. 24.

The court, having found that 75% of the gross receipts from the carriage of freight by the defendant over the years in question were derived from the interstate and foreign commerce business of the defendant, erred in failing to rule in favor of the defendant that Section 2210, Revised Laws of Hawaii 1925, excluded the defendant from the provisions of Chapter 132, Revised Laws of Hawaii 1925, and in failing to enter judgment for defendant accordingly.

Assignment No. 25.

The court erred in failing to rule that the tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, were levied in part upon the receipts of the defendant [258] derived from the carriage of exports as a part of a continuous journey from ports of the Territory of Hawaii to foreign countries, and were void under Article I, Section 9, Clause 5, of the Constitution of the United States, and in not entering judgment in favor of defendant accordingly.

Assignment No. 26.

The court erred in failing to rule that the tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, were levied in part upon the receipts of the defendant derived from the carriage of imports and exports as a part of a continuous journey to and from ports of the Territory of Hawaii to

foreign countries, and were void under Article I, Section 10, Clause 2, of the Constitution of the United States, and in not entering judgment in favor of defendant accordingly.

Assignment No. 27.

The court erred in failing to rule that since the tax or fees prescribed by Chapter 132, Revised Laws of Hawaii 1925, impinged in part upon the carriage of imports and exports between the Territory of Hawaii and foreign countries, as a matter of construction of Chapter 132, Revised Laws of Hawaii 1925, the defendant was not subject to the provisions of said Chapter, and in not entering judgment in favor of defendant accordingly.

Assignment No. 28.

The court erred in failing to rule in favor of the defendant upon the ground that the fees sought to be collected by plaintiff in its complaint imposed a tax or burden upon imports and exports carried by defendant as part [259] of a continuous journey to or from ports of the Territory of Hawaii to or from foreign countries, in violation of Article 1, Section 9, Clause 5, and Article I, Section 10, Clause 2, of the Constitution of the United States, and in not entering judgment for defendant accordingly.

Assignment No. 29.

The court erred in ruling and entering judgment in favor of the plaintiff upon the ground that the Act of Congress of March 28, 1916, 39 Statutes at



Large, Chapter 53, page 38, amending and approving Act 135, Session Laws of Hawaii 1913, was an approval by Congress of Act 89, Session Laws of Hawaii 1913, as amended.

**Assignment No. 30.**

The court erred in holding that the Act of Congress of March 28, 1916, 39 Statutes at Large, Chapter 53, page 38, amending and approving Act 135, Session Laws of Hawaii 1913, was an approval of Act 89, Session Laws of Hawaii 1913, as amended, permitting the legislature of the Territory of Hawaii to control, regulate and tax the interstate and foreign commerce business of the defendant, notwithstanding the provisions of Section 20 of Act 89, Session Laws of Hawaii 1913, and in entering judgment in favor of plaintiff accordingly.

**Assignment No. 31.**

During the examination of Homer Eaton, a witness called on behalf of plaintiff, the following occurred: [260]

“Q. Now, Mr. Eaton, I show you plaintiff's Exhibit ‘A’ for identification and ask you whether or not that schedule is a true statement or true reflection of the books of the Commission showing the amount of fees paid by all companies either subject to investigation by the Commission or subject to the complete jurisdiction of the Commission?”

A. That is an accurate transcript of it.

Q. I would ask you whether the group of

companies called Group 'A' are companies subject to investigation by the Public Utilities Commission in the Territory of Hawaii?

A. Yes.

Q. And Group 'B' are companies who are investigated and regulated by the Public Utilities Commission?

A. Yes, that is correct.

Mr. Cades: I offer this in evidence.

Mr. Anthony: We object to the admission of this exhibit in evidence on the grounds: that it is incompetent, irrelevant and immaterial; having no bearing on the issues raised under these pleadings, to-wit: the question of whether or not these fees are reasonable and the question of whether or not they bear any reasonable relationship to the cost of investigation; and on the further ground that it is proven by the stipulation on file in this cause that no investigation was made by the Public Utilities Commission and no services were performed,—that is, of this defendant,—and no services were performed by the Commission on behalf of the Inter-Island Steam Navigation [261] Company and the only thing that they did was to find out what was claimed to be owing under the statute; and on the further ground that what other companies pay for other and different services has no bearing or relationship to what is reasonable for the Inter-Island to pay for any services that were rendered for and on behalf of the Inter-Island.

The Court: You are not objecting to the form in which it is offered but the substance of what is in the offer?

Mr. Anthony: Exactly. We would like to have the opportunity to check the figures. We are not making any objection on the ground that it is taken from other documents or that he does not know of his own knowledge but we are objecting to it on the ground that it shows fees paid by other companies,—and on the other grounds that I have stated.

The Court: The court at this time will overrule the objection and allow you an exception. In connection with the jury-waived matter, you will have full opportunity to argue that.

(Exception noted)

The Court: The document will be received and marked Plaintiff's Exhibit 'A', subject to check for omissions and errors that may be discovered in the comparison." (Tr. pp. 5, 6).

Which ruling was duly excepted to and is hereby assigned as error. [262]

#### Assignment No. 32.

During the examination of Homer Eaton, a witness called on behalf of plaintiff, the following occurred:

"Q. Mr. Eaton, did you prepare at my request from the books and records in your custody a statement showing the total of the re-

ceipts from all sources and the total of disbursements of the Commission from the year 1913 to 1930?

A. Yes.

Q. You have that statement with you?

A. Yes.

Q. (Handing witness a document) Is this a copy of that statement?

A. That is correct.

Mr. Cades: I now offer this in evidence.

Mr. Anthony: We object to the receipt of this document in evidence on the same grounds, Your Honor, without repeating it.

The Court: The same ruling, exception allowed,—subject to correction for errors and omissions. This document may be marked Plaintiff's Exhibit 'B'." (Tr. p. 7.)

Which ruling was duly excepted to and is hereby assigned as error.

Assignment No. 33.

At the trial there was offered in evidence on behalf of defendant defendant's Exhibit DD for identification, which exhibit showed the payment by defendant of all income [263] and property taxes over the years in question paid by it to the Territory of Hawaii, and was offered for the purpose of showing that the tax or fees demanded in plaintiff's complaint could not be and were not in fact a tax in lieu of a property tax, which offer was refused by the court, to which ruling defendant duly excepted

and hereby assigns the same as error. (Tr. pp. 113-116.)

Assignment No. 34.

During the examination of Sewell Turner, a witness called on behalf of defendant, the following occurred:

"Mr. Anthony: At this time, if the Court please, we offer to prove each and every allegation of paragraph 3 of the amended answer, and paragraph 7 of the amended answer.

Mr. Cades: I object to the form of the offer of proof, your Honor. That is not the correct way of making an offer of proof. If for no other reason than that, it ought to be refused.

(Argument)

✓ The Court: Well the Court has assumed, Mr. Anthony, that regardless of the amounts thereof, that this defendant is not being taxed by the plaintiff in any way; that this defendant has paid all the property taxes, as an enterprise for profit, which are properly chargeable against it under the laws of the Territory, and that it has paid all income taxes and real and personal property taxes aforesaid which were assessed to and paid by said defendant at the same rate as those [264] assessed to and paid by all other persons, and has ruled that your question is not a material question.

Mr. Anthony: I call your Honor's attention also to the allegations of paragraph 7 of the amended answer, which we are ready to prove.



The Court: The objection to the offer will be sustained, and an exception allowed.

Mr. Anthony: So that there is no mistake in the record here, I understand the ruling of the Court goes not to the form of our offer of proof but to the materiality of any issue raised under these respective paragraphs of the answer?

The Court: That is correct. That if there was any question about it, the Court would give you ample time to state in detail all the facts. The Court has taken the view that it is immaterial." (Tr. pp. 113-116.)

Which ruling was duly excepted to and is hereby assigned as error. ○

Assignment No. 35.

During the examination of Stanley Kennedy a witness called on behalf of defendant, the following occurred:

"Q. Now, Mr. Kennedy, the Inter-Island is under the jurisdiction of the Shipping Board, I believe you referred to?

A. Yes, sir.

Q. Will you briefly tell the Court the things that you have to do pursuant to Federal regulations? What is regulated? [265]

Mr. Cades: I will interpose an objection, a special objection, to this. This is a little aside; he is going off the subject now, the quality of these gross receipts, and now seeks to have the

witness state as a matter of law the things that they are required to do.

The Court: The Court will sustain that objection. If there is anything as to the jurisdiction of the Shipping Board, it requires a reversal upstairs, and when so advised by the proper Appellate Division that that is the situation, then it is time enough to go into it.

Mr. Anthony: I would like to make an offer of proof in support of this question here: That the defendant is under the complete jurisdiction of the United States Shipping Board and other Federal statutes; that the Federal statutes regulate the kind of steamers that the defendant shall operate, the character of the personnel, the equipment, the tariffs,—in fact, everything down to the most minutest detail is completely regulated by Federal agency.

Mr. Cades: To your offer of proof we object on the ground that it states conclusions of law; that it is not a matter of fact, and the law can be read; it is all contained in the United States Code, and the Code itself demonstrates that it is not a complete regulation.

Mr. Anthony: I wish to offer further to prove that the United States Shipping Board does in fact regulate the business of this defendant in the manner prescribed by the Statute, and promulgates its regulations; that the rates of this defendant are in fact regulated by Federal agencies, and the tariffs are promulgated

periodically, and that this defendant is under complete regulatory jurisdiction of Federal agencies. [266]

The Court: The same ruling to the offer of proof.

Mr. Anthony: To which we note an exception, your Honor.

The Court: Exception allowed.

Q. Now, Mr. Kennedy, there is a Bureau of Steam investigation,—steam inspection?

A. Steamboat Inspection.

Q. A Bureau of Steamboat Inspection, and they maintain an office in Honolulu?

A. Yes, sir.

Q. Are your boats ever inspected?

A. Regularly.

Mr. Cades: If your Honor please, I want to interpose an objection to this line of examination, in the same way. At the time the case was submitted to the Supreme Court a complete survey of the Federal statutes was made with the idea of showing that no Territorial jurisdiction had been ousted by Federal statutes, and I do not think these are the kind of matters that should be gone into at this time.

Mr. Anthony: It has a bearing, in this way; We propose to show what the extent of Federal regulation and inspection is, and that will have some bearing, your Honor, in arriving at a conclusion as to whether this four thousand dollars per annum demanded by this Commission is ex-

cessive or arbitrary. For instance, if two Federal agents can investigate all the steamships that come into this port, foreign and domestic steamers, and if they can complete an investigation of all shipping in and out of this port, then it would have some bearing on the question of whether or not four or five thousand dollars is a reasonable fee for the public utilities commission to go down to examine the books of this company to see how much they owe them. [267]

The Court: The objection will be sustained. An exception is allowed.

Mr. Anthony: I would like to make an offer of proof later in the hearing, your Honor.

\* \* \* \* \*

Mr. Anthony: \* \* \* At this time, if the Court please, I wish to make an offer of proof as to the extent of the Federal regulation of this defendant, and I offer to prove by the witness in the court room, Mr. Stanley Kennedy, that this defendant is under the complete regulation of three Federal agencies, the United States Shipping Board, the Steamboat Inspection Service of the Department of Commerce, and the Post Office Department. The United States Shipping Board in Washington requires this defendant to submit annual reports, being comprehensive and voluminous documents covering the capital structure of the defendant, capital involved in operations, financial statement, list of officers and directors and personnel; that the rate, tariffs, rules and regulations covering ship-

ments of freight and passengers of this defendant, together with all other rules and practices, must be submitted to the Shipping Board at Washington, D. C. for the approval of that agency before becoming effective. That the Steamboat Inspection Service of the United States of America maintains an office at the port of Honolulu, making a quarterly inspection of all vessels of this defendant and a comprehensive and detailed inspection of each and every vessel of the defendant annually, the latter inspection covering boilers, life boats, life raft equipment, fire protection equipment, all safety devices and appliances,—[268] in other words, a complete physical internal and external inspection of the equipment of this defendant is made by this agency, and that the Steamboat Inspection Service also acts as a Board of Inquiry in cases of accident, meting out decisions and penalties in the case of offending masters of vessels; that the office of the steamboat inspection service in Honolulu issues licenses to officers, deck officers and engineers of the defendant, and has general supervision over the personnel operating its vessels,—the defendant's vessels:

That the Post Office Department, by virtue of Federal regulations, regulates to time of sailing so as to give the best possible mail service by this defendant among the several ports of the Hawaiian group; and that with respect to all accidents occurring to employees of the defendant such employees are wholly without the jur-



isdiction of the local Industrial Accident Board, but are within and under the Federal jurisdiction pursuant to the Federal statutes applying to maritime callings. I believe the name of the statute is "The Stevedores and Longshoremen's Act," and also the Jones Act,—Federal statutes. We ask the ruling of the Court on our offer of proof, that we started to make this morning.

\* \* \* \* \*

Mr. Anthony: We would also like to amplify our offer of proof to the effect that we will prove by this witness, Mr. Kennedy, that the Department of Steamboat Inspection Service of the United States of America maintains an office here in Honolulu employing two men, [269] and a stenographer and that is for the purpose of inspecting, among other things, these vessels, together with vessels of other lines, and that the total time expended by these men in this office here and the stenographer that has charge of the work is not more than one month per annum in the aggregate.

I take it the offer of proof is rejected, your Honor.

The Court: That is the ruling of the Court. Objection sustained. An exception will be allowed." (Tr. pp. 118, 119, 120.)

Which ruling was duly excepted to and is hereby assigned as error.

Assignment No. 36.

The court erred in allowing interest on the principal sued for.

Assignment No. 37.

The court erred in allowing interest at the rate of 8% on the principal sum sued for.

Assignment No. 38.

"Exception to Judgment

"Comes now Inter-Island Steam Navigation Company, Limited, defendant above named, and hereby excepts to the making and entry of the judgment herein upon the ground that said judgment is contrary to the law and the evidence.

Dated: Honolulu, T. H., April 20, 1934.

SMITH, WARREN, STANLEY  
& VITOUSEK and  
ROBERTSON & CASTLE,  
By J. G. ANTHONY,

Attorneys for Defendant. [270]

The foregoing exception is hereby allowed.

(Seal)

A. M. CRISTY,  
Presiding Judge."

Dated: Honolulu, T. H., this 28th day of June, 1934.

SMITH, WARREN, STANLEY  
& VITOUSEK and  
ROBERTSON & CASTLE,  
By NORMAN NEWMARK  
Attorneys for Inter-Island Steam  
Navigation Company, Limited,  
Plaintiff-in-error.

Copy received June 29, 1934.

SMITH, WILD & BEEBE. [271]

In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

STIPULATION FOR DEPOSIT OF CASH  
BOND IN LIEU OF SURETY BOND ON  
WRIT OF ERROR.

[Endorsed]: Filed, June 28, 1934. [272]

Whereas the Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii on April 20, 1934, in the Circuit Court of the First Judicial Circuit, in that certain action at law entitled "The Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, Plaintiff vs. Inter-Island Steam Navigation Company, Limited, a Hawaiian corporation, Defendant," Law Number 12809, did recover a judgment against Inter-Island Steam Navigation Company, Limited, in the sum of Fifty-three Thousand Four Hundred Thirty-Five and 50/100th Dollars (\$53,435.50) from which judgment the said Inter-Island Steam Navigation Company, Limited, is about to sue out a writ of error in the Supreme Court of the Territory of Hawaii; and

Whereas it has been agreed by and between the parties hereto that the said Inter-Island Steam Navigation Company, Limited, Defendant, Plaintiff in-error, may deposit the sum of [273] Sixty Thousand Dollars (\$60,000.00) in cash as security for the payment of the judgment in said action at law, together with interest thereon, in case of failure to

sustain the writ of error, in lieu of a surety bond provided for in Section 2529, Revised Laws of Hawaii, 1925, under the terms and conditions hereinafter set forth;

Now, therefore, it is stipulated and agreed, by and between the parties hereto, as follows:

(1) That, in lieu of the bond provided for in Section 2529, Revised Laws of Hawaii, 1925, the said Inter-Island Steam Navigation Company, Limited, may deposit with the Clerk of the Supreme Court the sum of Sixty Thousand Dollars (\$60,000.00) in cash, or a certified check for such amount payable to said Clerk, which said cash or check shall be then forthwith deposited by the said Clerk in The Bank of Hawaii in a savings account opened in the name of the "Clerk of the Supreme Court for the use and benefit of the Public Utilities Commission of the Territory of Hawaii or the Inter-Island Steam Navigation Company, Limited, in accordance with that certain stipulation dated June 18th, 1934." Such account shall be held in said Bank at the risk of said Defendant, Plaintiff-in-error, subject, as to withdrawal and in all other respects, to the terms and conditions of this stipulation as now written, or as the same may be amended from time to time by the parties hereto;

(2) Said deposit shall be withdrawn by the said Clerk only upon the obtaining of the counter-signature of the then Chief Justice of the Supreme Court of the Territory of Hawaii, and such counter-signa-

ture to such withdrawal shall be [274] given in accordance with the following:

(a) If the said Supreme Court shall enter up in said Supreme Court its judgment in favor of the Defendant, Plaintiff-in-error, then said deposit shall be withdrawn and paid over in full, together with any and all interest that may have accrued thereon, to said Defendant, Plaintiff-in-error;

(b) If the Supreme Court shall enter up final judgment in favor of the Plaintiff, Defendant-in-error, said money shall remain on deposit until the expiration of the time for perfecting an appeal to the United States Circuit Court of Appeals, and if no appeal shall then have been taken there shall then be paid over to said plaintiff such part of such deposit as shall be necessary to pay said judgment, together with lawful interest thereon, and the remainder shall be paid to said defendant;

(c) In case an appeal be taken to the United States Circuit Court of Appeals said money shall remain on deposit and shall be withdrawn only upon the filing of a mandate of the highest court to which said case may be appealed or taken by writ of error, certiorari or some other method, in which case said withdrawal shall be in accordance with the said mandate.

(3) All interest earned on the account opened as aforesaid shall be subject to the terms and condi-



tions hereof and, with the principal sum originally deposited, shall stand as security for the payment of said judgment.

(4) Upon the approval of this stipulation by the Chief Justice or the Supreme Court of the Territory of Hawaii [275] and upon the Clerk of Court noting hereon that the sum of Sixty Thousand Dollars (\$60,000.00) has been received by him and deposited in The Bank of Hawaii in accordance with the foregoing terms, the writ of error to be taken by said Inter-Island Steam Navigation Company, Limited, may proceed in all respects and to the same intent and purposes as if a bond provided for in Section 2529, Revised Laws of Hawaii, 1925, had been filed.

(5) That execution shall not issue or be sued out against the property and effects of the defendant so long as said money shall remain on deposit and that the money so deposited shall stand in lieu of and obviate the necessity of the filing by the defendant in any court of a supersedeas or other bond conditioned for the payment of said judgment.

Dated, Honolulu, T. H., June 18th, 1934.

Approved

SMITH, WARREN, STANLEY &  
VITOUSEK  
per W. L. STANLEY.

Approved

**ROBERTSON & CASTLE,**

per **N M N & A. G. M. R.**

**PUBLIC UTILITIES COMMISSION OF  
THE TERRITORY OF HAWAII,**

By **F. O. BOYER,**

Chairman.

**W. B. PITTMAN,**

Attorney General.

**SMITH, WILD & BEEBE,**

Special Attorneys.

**INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,**

By **A. G. BUDGE,**

Its Vice President.

By **HENRY S. TURNER,**

Its Treasurer.

The foregoing Stipulation is hereby approved:  
(Seal)

**ANTONIO PERRY,**

Chief Justice of the Supreme Court  
of the Territory of Hawaii.

[276]

On the 28th day of June, 1934, at 11:05 o'clock  
A. M., I received from the Inter-Island Steam Navigation Company, Limited, a certified check drawn by it on The Bank of Hawaii, payable to me as Clerk of the Supreme Court of the Territory of Hawaii, which said check, endorsed by me, together with a copy of this stipulation, was deposited in

said Bank of Hawaii in a savings bank account opened in accordance with the terms and provisions hereof on the 28th day of June, 1934, at 11:10 o'clock A. M.

(Seal)

ROBERT PARKER, JR.,  
Clerk of the Supreme Court of  
the Territory of Hawaii. [277]

In the Supreme Court of the Territory of Hawaii.  
October Term 1935.

[Title of Cause.]

OPINION OF THE COURT.

[Endorsed]: Filed July 25, 1936. [278]

HON. A. M. CRISTY, JUDGE.

Argued January 14, 15, 16; June 4, 1936.

Decided July 25, 1936.

Banks and Peters, JJ., Coke, C. J., disqualified.

Public Utility—fees—constitutional law.

When fees computed by gross income and issued and outstanding capital stock are imposed by legislative authority upon a public utility doing business in the Territory for the purpose of creating a fund to be used exclusively for the maintenance of a commission empowered to exercise supervision over all public utilities coming within its jurisdiction, such fees, even though a portion of the gross income of a utility is derived from its interstate and foreign business, are not prohibited by the commerce clause of the Federal Constitution, nor are such fees pro-

hibited by the imports and exports clauses of the Constitution. They are likewise not affected by the fact that the utility is engaged in the carriage of mail, freight and passengers for the United States government. [279]

Same—same—legislative determination.

When fees for the maintenance of a public utilities commission are determined by legislative enactment, such determination, unless it appears from the Act itself, or by proof that the fees are so discriminatory, and arbitrary and exorbitant as to be the equivalent of a denial of due process of law or of equal protection of the laws, will not be disturbed by the court.

Same—same—interest.

Interests on unpaid amounts due from a public utility for fees required by section 2207, R. L. 1925, is allowable. [280]

#### OPINION OF THE COURT BY BANKS, J.

By written stipulation of the parties which appears in the record, this case was submitted for decision to the court with only two of its justices sitting.

In 1913 the territorial legislature created a public utilities commission and conferred upon it and each of its members certain powers. Among these powers was included the broad one of exercising general supervision over all public utilities doing business in the Territory. More specifically, the commission and each member thereof was empowered to "examine into the condition of each public utility doing business in the Territory, the manner in which

it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written [281] complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum." R. L. 1925, § 2193.

The commission is also given the following powers: "If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or neces-



sity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it [282] may deem best." R. L. 1925; § 2201.

The legislative enactment also contains the following provisions: "There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory

during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter." R. L. 1925, § 2207.

It was for the recovery of a judgment for these fees alleged to be due for the years 1923-1930 inclusive, and aggregating \$33,724.44, that the instant suit was brought. The court below trying the case, jury waived, rendered a judgment in favor of the plaintiff in the sum of \$53,435.55, which included principal and interest. The defendant brings the case here on a writ of error.

A preliminary question must first be disposed of. It appears from the record in this case that the defendant did not, prior to the issuance of the writ of error, file with the clerk a bond as required by section 3556, R. L. 1935, but in lieu and instead thereof by stipulation of the parties, deposited with the clerk a certified check for \$61,000, that be- [283] ing the amount required by the statute in case a bond had been given. Prior to the argument of the case on its merits doubt was expressed by a member of the court as to whether the giving of a statutory bond was necessary to the jurisdiction of the court and therefore could not be waived by consent of the

parties. The court requested briefs on this question. Counsel for the defendant in error asked to be excused from filing a brief on the ground that it might be inconsistent with the stipulation of his client. Thereupon the court appointed Mr. Carl Wendell Carlsmith, a member of the bar as amicus curiae to render to the court the required service. Elaborate and able briefs were accordingly filed by counsel for plaintiff in error and by the amicus curiae. After careful study of the question the court reached the conclusion that the statutory bond was a procedural and not a jurisdictional matter and hence could be waived. The case is therefore considered on its merits.

The record discloses and it was found by the court below to be a fact that 75% of the defendant's gross annual freight receipts was derived from freight carried by it in commerce with foreign nations and among the several States. From this fact the defendant contends that the judgment under review is erroneous. More specifically the contention is that the fees sought to be collected constitute an unlawful burden upon the defendant's national and international commerce and are therefore in contravention of the commerce clause of the Federal Constitution. In considering this contention it must be remembered that the defendant is a domestic public utilities [284] corporation, having derived its existence and its powers from local legislative authority, and that all its property holdings are located entirely within the Territory of Hawaii and all its activities are there conducted.

When this case was formerly before this court on reserved questions it was definitely held that "it has long since been well established judicially that the investigation and the regulation of public utility corporations is a rightful subject of legislation" and "since the power to investigate exists, the power to exact fees to defray the expenss of such invstigations follows." *Territory v. I. I. S. N. Co.*, 32 Haw. 127, 131, 138. We are in complete accord with this pronouncement and reaffirm it as being entirely sound. With this in mind let us inquire whether the commerce clause of the Federal Constiution was violated by the imposition of the fees in question. The powers conferred by the legislature upon the public utilities commission are very comprehensive and are summarized as follows: To supervise all public utilities doing business within the Territory. There was thus delegated to the commission, so far as these utilities are concerned, the great police power of the Territory. It is by the exercise of this power that the Territory, through its commission, is enabled to ascertain whether any public utility coming within its jurisdiction is conducting the whole or any part of its business in a manner contrary to the public welfare and to take whatever steps it is authorized to take to correct such evils as may be found to exist. The supreme purpose of this power is to protect the safety of the people and so vital is it to this purpose that the commerce clause of the Federal Consti [285] tution has often been held not to interfere with its exercise. The necessity for

police supervision, so far as the defendant is concerned, arises out of the fact that it is empowered to and is engaged in a business which, directly and to a large extent, affects the public welfare.

It is essential to the well-being of the public which is obliged to patronize it that the defendant be kept under official scrutiny. By the nature of its business it has made this surveillance necessary, and it is not only just but we think legal that it be required to make reasonable contributions to a fund to be used exclusively for the maintenance of the agency authorized to perform the duty.

It was decided by this court in *Territory v. I. I. S. N. Co.*, supra, that the Territory has not been deprived of the power of investigation. Speaking on this subject the court said (p. 138): "The power to legislate on all rightful subjects of legislation was given to the legislature by the Organic Act in unambiguous terms. The intent to withdraw that power from the legislature, in so far as mere investigations of and complaints against a public utility doing business within this Territory are concerned, is not discernible in the Shipping Board Act." The power of the Territory to investigate the activities of the defendant being thus established in this jurisdiction the Territory may, in the exercise of this police power, legitimately impose upon the defendant's national and international commerce, incidental and indirect burdens unembarrassed by the commerce clause of the Federal Constitution.

After diligent and laborious search by court and counsel it must be confessed that no case has been



discovered [286] which is entirely analogous in its facts to the case at bar. We are obliged therefore to rely on such judicial precedents as seem to announce principles which are helpful in the solution of the problem we are now considering.

In *Morf v. Bingaman* (U. S. Adv. Sh.), 80 L. Ed. 840, 56 S. Ct. 756 (decided May 18, 1936), the law of New Mexico forbade the use of state highways for the transportation of any motor vehicle on its own wheels for the purpose of sale within or without the State unless the vehicle was licensed by the State or owned by a licensed dealer and operating under a dealer's license or operating under a special permit issued by the state commissioner of revenue. The charge for the permit was \$7.50 for each vehicle if transported by its own power and \$5 per vehicle if it was towed or drawn by another vehicle. The appellant, Morf, was engaged in the business of purchasing automobiles in States other than New Mexico and transporting them on their own wheels through New Mexico to California, where they were offered for sale. One of the grounds upon which the appellant assailed the statute was that it imposed an unconstitutional burden on interstate commerce. In affirming the trial court which sustained the law the court said: "It [the fee] is not shown to exceed a reasonable charge for the privilege and for defraying the cost of police regulation of the traffic involved, such as a state may impose, if non-discriminatory, on automobiles moving over its highways interstate. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Clark v. Poor*,

274 U. S. 554; Interstate Transit, Incorporated v. Lindsey, 283 U. S. 183; Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285. The [287] facts, as stipulated, establish that the transportation of automobiles across the state in caravans, for purposes of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the highways in caravans or processions. Seventy-five to eighty per cent of the cars in appellant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire

caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic. There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of [288] use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, *even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.*" (Italics by the court.)

So in the case before us the very fact that the defendant is engaged in a business affected with a public interest renders police supervision necessary for the public weal. Therefore in order to relieve the Territory of the additional expense of maintaining the commission the burden should be placed upon the utilities whose existence and activities render the supervision, out of which the expense arises, necessary. This is exactly what was done in the Morf case, where it was held that the imposition of the burden upon the plaintiff was not forbidden by the commerce clause of the Federal Constitution.

In the Railroad Commission Cases, 116 U. S. 307, the State of Mississippi enacted a law entitled "An

Act to provide for the regulation of freight and passenger rates on railroads in this State, and to create a commission to supervise the same, and for other purposes." Among other things it required all railroads operating in the State to file tariff charges with the railroad commission; to post at each of its depots all [289] rates, schedules and tariffs; to furnish the commission with all information relating to the management of their respective lines, and particularly with copies of their leases, contracts, and agreements for transportation with express, sleeping-car or other companies; to report accidents to the commission; to make to the commission quarterly returns embracing all receipts and expenditures; to provide at least one comfortable and suitable reception room at each depot and to keep in the reception room a bulletin board showing the time of arrival and departure of trains. One of the grounds upon which suit was brought to enjoin the railroad commission from enforcing the provisions of the statute against the Mobile and Ohio Railroad Company, a public utility incorporated in Mississippi and other States, was that the utility was engaged in interstate commerce and therefore the statute was in violation of the commerce clause. Speaking on this subject, the court said (pp. 333, 334, 335); "There can be no doubt that each of the States through which the Mobile and Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee, and Kentucky, to some point near the mouth of the Ohio

River; where it would connect with another railroad to the lakes, and thus form a continuous line of inter-state communication between the Gulf of Mexico in the south, and the Great Lakes in the north. It is equally certain that Congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each State is for all the purposes of local government a domestic corporation, and that its railroad within [290] the State is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a State is while there subject to the constitutional authority of the State government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort,



the convenience, or the safety of those who are entitled to look to the State for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from State regulation or State control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States [291] within the exclusive jurisdiction of Congress, that is to say, using the language of this court in *Cardwell v. Bridge Co.*, 113 U. S. 205, 210, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States.' Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the inter-state business of the company or impair the usefulness of its facilities for inter-state traffic. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of inter-state commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within."

*Munn v. Illinois*, 94 U. S. 113, was a case involving an Act of the State of Illinois to regulate public warehouses and the warehousing and inspection of grain. *Munn* and *Scott*, the managers and lessees of a public warehouse located in Chicago, were prosecuted and convicted for violating two of the provi-

sions of the statute in that they failed to procure a license for the transaction of their business as provided by the law and fixed storage charges higher than the prescribed maximum. In defense they urged the unconstitutionality of the statute on the ground, among others, that it was repugnant to the commerce clause and the sixth clause of section 9, article I of the Federal Constitution. In sustaining the Act Mr. Chief Justice Waite said in part (pp. 130, 131, 132, 135): "Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. \* \* \* When private property [292] is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle. \* \* \* 'The great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. \* \* \* Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. \* \* \* The quantity [of grain] received in Chicago has made it the greatest grain market in the world.' \* \* \* Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the seashore' may be a 'virtual' monopoly. Under such circumstances it is difficult to

see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he \* \* \* take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* [293] only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. \* \* \* We come now to consider the effect upon this statute of the power of Congress to regulate commerce. It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that 'it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain

would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." See also *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155 and *Peik v. Chicago, etc. Ry. Co.*, 94 U. S. 164.

In *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, the appellee, a state agency known as the state dock commission, was authorized to conduct the operation of all harbors and seaports within the State of Alabama and to adopt rules for that purpose. Pursuant to this power the commission adopted a schedule of harbor fees "for mooring and shifting vessels in [294] the harbor, and for all vessels of specified classes entering the harbor, including a fee of \$7.50 for vessels '500 tons and over'." Appellant, the Clyde Mallory Lines, contended that the \$7.50 fee contravened the Federal Constitution in that it was a duty of tonnage and also that it was repugnant to the commerce clause. In rejecting both contentions the court said (p. 264): "The \$7.50 fee is conceded not to be a charge for the use of the state docks or for mooring and shifting vessels, for which specific charges are levied. It is the only fee attributable to the general service rendered by the Commission in securing the benefits and protection of the rules to shipping in the

harbor. We accept the conclusion of the state court that it is charged for a policing service rendered by the state in the aid of the safe and efficient use of its port, and we address ourselves to the question whether such a fee is forbidden by the Constitution either because it is a 'duty of tonnage' or an unwarranted burden on interstate commerce. \* Appellant places its reliance on those cases in which a tax, levied in the guise of wharfage or a charge for medical inspection, was condemned because imposed on all vessels entering a port, whether receiving the benefit of the service or not, see *Steamship Co. v. Portwardens*, supra; *Cannon v. New Orleans*, supra; *Peete v. Morgan*, 19 Wall. 581. It argues that the present fees must similarly be condemned because imposed on all vessels entering the port, and points out that appellant has neither asked nor received any police service such as that which the state court regarded as the basis for the charge. But the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs [295] from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it. Upon this ground, among others, a fee for half pilotage imposed on vessels such as were not required to take a pilot was upheld in *Cooley v. Board of Wardens*, supra, 312, 313. We conclude that a reasonable



charge for a service such as the present is neither within the historic meaning of the phrase 'duty of tonnage' nor the purpose of the constitutional prohibition. \* \* \* The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. \* \* \* And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. Such charges were considered and upheld in [cases cited]. A similar exercise of state power is the imposition of inspection or license fees incident to or in support of local regulations of interstate commerce. \* \* \* Its most recent manifestation is the levy of a tax which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in [cases cited]."

[296]

There remains for determination upon this branch of the case the question of whether or not the fees imposed are disproportionate to the reasonable expense of the execution by the public utilities commission of the statutory duties imposed upon it by the Utility Act.

The trial court at the request of the defendant found, and we think correctly, "that, during the

year 1922 to date 'no services were ever performed by the public utilities commission in connection with the defendant utility, and that the only time spent by the public utilities commission on the business of this defendant was on three separate occasions of one-half hour each' in which the auditor of the commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed \$30.00 gross" and that "only such service as indicated was in fact rendered directly as a service which could be characterized as 'on behalf of the defendant.' " The learned trial judge also found as a conclusion of law that a reasonable relationship existed between the fees prescribed and the duties which the utilities commission was created to perform. In giving his reasons on this conclusion he said in his written decision: "But it must be noted at this point that there is another question involved: not simply service rendered to the defendant but also the requirement of supervision and watchfulness the necessity for which is created by the very fact of a corporation entering the field of public utility service. As to general authority to tax such corporations see, *Kansas etc. R. Co. v. Botkin*, 240 U. S. 227; *St. Louis etc. R. Co. [297] v. Middlekamp*, 256 U. S. 226. See also *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Horn Silver Mining Co. v. N. Y.*, 143 U. S. 305. When such corporations are permitted to do business affecting the public and are granted permission by the government, then it becomes the duty

of the government to its citizens that agencies representing the public be continuously existent to supervise the activities of such companies so that the public's interest in appropriate service be protected. To be sure it might be said that the expense of such supervision should be borne out of general taxes. Yet on the other hand it might equally be said that no need for supervision exists until these corporations begin to function. Hence a method of meeting the new expense of public supervision could equally well be provided by special tax on the corporations whose business creates the necessity, segregating the proceeds for the purpose of bearing the expenses in the field requiring the service. These questions are matters of legislative policy in distributing the tax burden in such a way as to have a reasonable and general application. If Congress by creating other federal agencies has effected the necessities of supervision by the local commission over the defendant so that further and other classification of expense charges or taxes of such a supervisory body as the local commission could be legitimately advocated, the remedy in that respect is with the legislature or Congress and not with the court. It might also be noted that the question here under dispute is not solely one as to whether or not benefits were derived by the defendant for the existence of the commission but the reverse may also be true that the mere existence of the commission [298] as an agency to watch and investigate on its own motion without turning a hand

toward such investigation is of itself a detriment to conduct inimicable to the public by a utility. And the mere existence of a public body ready to act if necessary involves expense which legislation has solely placed upon those companies engaged in utility business." We are in accord with this view.

It is no legal obstacle to the collection of the fees that no investigation was made by the commission of the defendant's business during the period alleged in the complaint. (*Clyde Mallory Lines v. Alabama*, *supra*, p. 266.) If this were not true any one or all of the utilities might, by intervals of good behavior, suspend the functioning of the commission and thus defeat the plan inaugurated by the legislature for the protection of the public. The public utilities commission is in a sense like the policeman on the beat whose very presence is conducive to good order and who must be supported even though it is never necessary for him to make an arrest.

Obviously where the fees imposed for investigation include the cost of something "beyond the legitimate exercise" of the statutory duties of the commission or are so clearly excessive as to lead irresistibly to the conclusion that the fees are disproportionate to the services authorized to be rendered or are imposed for general revenue purposes, it is the duty of the court as a matter of law to refuse to sanction them. (*McLean v. Denver & Rio Grand R. R. Co.*, 203 U. S. 38, 55; *Brimmer v. Reb-*

man, 138 U. S. 78, 83; Foote v. Maryland, 232 U. S. 494; Postal Telegraph-Cable Co. v. Taylor, 192 U. S. 64; Patapsco Guano Co. v. North Carolina, 171 U. S. 345; Red "C" Oil Co. v. North Carolina, 222 U. S. 380; Savage v. Jones, 225 U. S. 501.) This, however, is not the situation with which we are [299] dealing. The fees prescribed are required to be and are in fact devoted exclusively to the performance by the utilities commission of the duties imposed upon it by the Utility Act. The employment of gross receipts and capital stock as a means of ascertaining the amount of the fees required to be paid in order to meet the expense of the commission in the performance of its duties is a legislative determination of the reasonableness of such expenses. It does not appear from the Act itself, and the record is silent on the subject, that the amounts sought to be collected from the defendant for the years in question would exceed that necessary to meet the expense of its investigation had the commission found it necessary to perform this duty. Prima facie inspection fees imposed by municipal authority are reasonable. (Western Union Tel. Co. v. New Hope, 187 U. S. 419.) It is a matter peculiarly within the province of the legislature to determine and in the absence of any showing of unreasonableness the courts may not interfere. (Foote v. Maryland, *supra*.) The burden rested upon the defendant to show that the fees are disproportionate to the services authorized and therefore in excess of what was necessary for the per-



formance by the commission of the duties imposed upon it by law. (*Atlantic etc. Tel. Co. v. Philadelphia*, 190 U. S. 160.) This it has failed to do. Under these circumstances we are unable to say as a matter of law or fact that the fees exacted are disproportionate to the services required. We think therefore they do not constitute an unlawful burden upon commerce among the several States and with foreign nations, and that the objections to the Act upon that ground are without merit. We think for the same reasons that the further contention that the [300] imposition of the fees violates the imports and exports clauses of the Federal Constitution is likewise without merit. For like reasons the defendant's contention that the fees impose a burden upon its carriage of mail, freight and passengers, which service is performed in behalf of the United States government, cannot be sustained. The fees are no more a burden on this service than they are a burden on national and international commerce or on imports and exports.

The defendant further challenges the Utility Act upon the grounds that the fees are so unreasonable and arbitrary and discriminatory as to be tantamount to a taking of property without due process of law and that they deny to the defendant the equal protection of the laws and therefore contravene the 5th and 14th amendments of the Federal Constitution. What we have already said on the question of whether the fees imposed are a forbidden burden on commerce is sufficient to dispose of the conten-

tion made regarding due process and equal protection of the laws.

Finally the defendant contends that the inclusion of interest in the judgment is erroneous. The Public Utility Act does not expressly impose interest on delinquent fees payable under section 2207, *supra*. It must be conceded that there is no statutory provision entitling the plaintiff to recover interest on the fees in suit from the respective dates when the same accrued. Under all the state authorities interest under such circumstances is not recoverable.

The Federal courts, however, take a different view. In the case of *Billings v. United States*, 232 U. S. 261, 288, the court held that in actions upon statutory obligations from an [301] individual to the Federal government interest is allowable "in all cases where equitably due unless forbidden by statute." Mr. Chief Justice White, speaking for the court, said: "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute. From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in

this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules."

It is expressly provided by the Utility Act that the fees imposed be paid by the utility to the commission. A personal debt results from the utility to the commission for the collection of which the latter may bring an action in debt. Clearly justice and equity as between the utility and the commission on the one hand and all utilities as between themselves on the other, demand that interest should accrue to the commission upon delinquent fees.

Moreover, the decisions of the United States Supreme Court, as this court has repeatedly held, are binding on this court and where a conflict occurs upon questions of substan- [302] tive law between the highest courts of the States and the highest Federal court the latter controls.

After careful consideration of the errors assigned we are of the opinion that they are without merit. They are therefore overruled and the judgment appealed from is affirmed.

J. G. Anthony and N. M. Newmark (Smith, Warren, Stanley & Vitousek and Robertson & Castle with them on the briefs) for plaintiff in error.

J. R. Cades (Smith, Wild, Beebe & Cades on the brief) for defendant in error.

C. W. Carlsmith, amicus curiae.

(s) JAS. J. BANKS,

(s) E. C. PETERS. [303]

In the Supreme Court of the Territory of Hawaii.

No. 2174.

THE TERRITORY OF HAWAII by the Public  
Utilities Commission of the Territory of Hawaii,  
Plaintiff, Defendant-in-Error.

vs.

INTER-ISLAND STEAM NAVIGATION COM-  
PANY, LIMITED, a Hawaiian corporation,  
Defendant, Plaintiff-in-Error.

Writ of error to the judgment of the Circuit Court  
First Judicial Circuit, Hon. A. M. Cristy pre-  
siding.

JUDGMENT ON WRIT OF ERROR.

[Endorsed]: Filed Jan. 21, 1937. [304]

Pursuant to the opinion of the above entitled  
court rendered and filed in the above entitled cause  
on July 25, 1936, the judgment of the Circuit Court,  
First Judicial Circuit, Territory of Hawaii, is  
affirmed.

Dated at Honolulu, T. H., this 21st day of Jan-  
uary, 1937.

By the Court:

[Seal]

ROBERT PARKER, JR.,  
Clerk, Supreme Court.

Approved:

JAS. J. BANKS,  
Associate Justice, Supreme Court, Territory  
of Hawaii. [305]

Tuesday, January 16, 1935.

In the Chambers of Associate Justice James J. Banks at 10:00 o'clock A. M.

Present.

Hon. James J. Banks, Hon. Charles F. Parsons, Jr., and Hon. Norman D. Godbold First Judge, Circuit Court First Circuit, sitting in place of Hon. James L. Coke, disqualified.

[Title of Cause.]

Preliminary hearing as to whether a cash deposit in lieu of the bond required by statute before a writ of error is issued gives the court jurisdiction.

Appearances:

J. G. Anthony and Norman Newmark of the firm of Robertson & Castle and W. L. Stanley of the firm of Smith, Warren, Stanley & Vitousek, for Inter-Island Steam Nav. Co.

J. R. Cades of the firm of Smith, Wild, Beebe & Cades for the Public Utilities Commission.

W. B. Pittman, Attorney General for the Territory.

Mr. Cades stated that he had consulted with the Attorney General and that the Attorney General agreed with him that he should not take a position inconsistent with stipulation that has already been filed and that the request of counsel for the Inter-Island Steam Navigation Company to proceed with the argument on the merits of the case be granted.

The Court: Because of the importance of this question and because of Mr. Cades position the



court will appoint an Amicus Curiae to aid the court in the study of the question as to whether a cash deposit in lieu of the bond required by statute before a writ of error is issued gives the court jurisdiction. The attorneys will be notified when the court is ready to proceed.

The Court adjourned at 10:25 o'clock A. M.

GUS K. SPROAT,

Deputy Clerk. [306]

---

Tuesday, January 14, 1936.

In the Chambers of Associate James J. Banks at  
10:00 A. M.

Present.

Hon. James J. Banks, Acting C. J., Hon. Emil C. Peters, J., and Hon. Norman D. Godbold, First Judge, Circuit Court, First Circuit, in place of Hon. James L. Coke, disqualified.

Argument.

Appearances:

J. G. Anthony and N. Newmark of the firm of Robertson & Castle and W. L. Stanley of the firm of Smith, Warren, Stanley & Vitousek for Inter-Island Steam Nav. Co.

J. R. Cades for the Public Utilities Comm.

When the court convened Mr. Anthony commenced the opening argument.

At 11:05 the court took a recess for five minutes.

At 11:10 Mr. Anthony resumed the opening argument.

At 11:55 o'clock A. M., the court ordered the opening argument continued until tomorrow morning, January 15, 1936, at 10:00 o'clock.

The Court adjourned to that time.

GUS K. SPROAT,  
Deputy Clerk.

---

Wednesday, January 15, 1936.

Court convened at 10:00 o'clock A. M.

In the Chambers of the Associate Justice Banks.

Court—same.

Counsel—same.

When the court convened Mr. Anthony resumed the opening argument and concluded the same at 10:40 o'clock A. M.

Mr. Cades answered.

At 11:55 A. M., the court ordered the answering argument continued until tomorrow morning, January 16, 1936, at 10:00 o'clock.

The Court adjourned to that time.

GUS K. SPROAT,  
Deputy Clerk. [307]

Thursday, January 16, 1936.

In the Chambers of Associate Justice James J.  
Banks at 10:00 o'clock A. M.

Court—Same.

Counsel—Same.

Argument.

When the court convened Mr. Cades resumed his  
answering argument and concluded at 11:10 o'clock  
A. M.

Mr. Newmark replied briefly.

Case submitted and taken under consideration.

Court adjourned at 12:00 o'clock Noon, until to-  
morrow morning, January 17, 1936, at 10:00 o'clock.

GUS K. SPROAT,

Deputy Clerk.

---

Saturday, July 25, 1936.

[Title of Cause.]

At 9:50 o'clock A. M., this day the court handed  
down its written opinion of the above entitled cause  
affirming the judgment appealed from.

GUS K. SPROAT,

Deputy Clerk.

Wednesday, January 20, 1937.

At 3:00 o'clock P. M.

[Title of Cause.]

Minute Order.

Petition by C. Wendell Carlsmith, amicus curiae,  
for the allowance of attorney's fees is withdrawn.

GUS K. SPROAT,

Deputy Clerk. [308]

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.]

## PETITION FOR APPEAL.

[Endorsed]: Filed April 2, 1937. [309]

To the Honorable Acting Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now Inter-Island Steam Navigation Company, Limited, defendant, plaintiff-in-error above named, by its attorneys, Robertson, Castle & Anthony, deeming itself aggrieved by the decision and final judgment of the above entitled Court in the above entitled cause, which final judgment of the Supreme Court of the Territory of Hawaii was made and entered on January 21, 1937, pursuant to the opinion of the Court rendered July 25, 1936, and claiming that there are manifest and material errors to the damage of said Inter-Island Steam Navigation Company, Limited, in [310] said cause, which errors are specifically set forth in the Assignment of Errors filed herewith, to which reference is

hereby made, and respectfully prays that an appeal may be allowed in the above-entitled cause, and that it be allowed to prosecute said appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the statutes in such cases made and provided; that an order be made fixing the amount of security that said Inter-Island Steam Navigation Company, Limited, shall give, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings, and papers in this cause, duly authenticated, for the correction of the errors complained of, and that a citation may issue.

And in this behalf, said Inter-Island Steam Navigation Company, Limited, shows that said judgment was rendered on a writ of error in the above entitled court and cause, and involves the Constitution and laws of the United States of America, and that the value in controversy, exclusive of interest and costs, exceeds \$5,000; and further that the Honorable James L. Coke, Chief Justice of the Supreme Court of the Territory of Hawaii, is disqualified from acting in said cause, and that the Honorable James J. Banks is the Senior Associate Justice of the Supreme Court of the Territory of Hawaii. [311]

Dated, Honolulu, Hawaii, April 2, 1937.

ROBERTSON, CASTLE & ANTHONY

By J. G. Anthony.

Attorneys for Inter-Island Steam Navigation Company, Limited.



Territory of Hawaii,  
City and County of Honolulu—ss.

J. G. Anthony, being first duly sworn, under oath deposes and says that he is a member of the law firm of Robertson, Castle & Anthony, attorneys for Inter-Island Steam Navigation Company, Limited, defendant, plaintiff-in-error in the above entitled cause, and as such has authority to make oath on its behalf; that he has read the foregoing petition for appeal, knows the contents thereof, and that the matters and things therein set forth are true of his own knowledge, and that the value in controversy, exclusive of interest and costs, exceeds \$5,000.

J. G. ANTHONY.

Subscribed and sworn to before me this 2nd day of April, 1937.

[Seal]

CHARLES Y. AWANA.

Notary Public, First Judicial Circuit, Territory of Hawaii. [312]

Service of a copy of the foregoing Petition for Appeal is hereby admitted this 2nd day of April 1937.

SMITH, WILD, BEEBE & CADES.

By D. EDMONDSON,

Attorneys for Public Utilities Commission of  
The Territory of Hawaii. [313]

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.]

ASSIGNMENT OF ERRORS.

[Enodrsed]: Filed April 2, 1937. [314]

Assignment No. 1.

The Supreme Court of the Territory of Hawaii erred in ruling that appellant is subject to the provisions of Chapter 132 Revised Laws of Hawaii 1925, and in entering judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.\*<sup>(1)</sup>

Assignment No. 2.

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court upon the ground that Congress by the enactment of. [315] the Act of September 7, 1916, 39 Statutes at Large, Chapter 451, page 728 (U. S. C.-A. Title 46 Chapter 23), took over the whole field of the regulation of the business of appellant as a common carrier by water, and vested exclusive jurisdiction in the United States Shipping Board, thereby ousting the Public Utilities Commission of the Territory of Hawaii\*<sup>(2)</sup> of jurisdiction over appellant, including jurisdiction to collect the fees demanded in this case.

---

\*<sup>(1)</sup>The Circuit Court of the First Judicial Circuit is hereinafter referred to as the "Circuit Court."

## Assignment No. 3.

The Supreme Court of the Territory of Hawaii, having ruled that the Public Utilities Commission was divested of all jurisdiction to regulate the business of appellant by the Act of Congress of September 7, 1916, 39 Statutes at Large, Chapter 451, page 728 (U. S. C. A. Title 46, Chapter 23), erred in ruling that said Commission, pursuant to Chapter 132 Revised Laws of Hawaii 1925, had the power to collect fees from appellant to defray the theoretical expenses which the Commission might have incurred in supervising and inspecting appellant when under the uncontradicted evidence no inspection or supervision was performed and no expenses whatsoever were in fact incurred.

## Assignment No. 4.

The Supreme Court of the Territory of Hawaii [316] erred in failing to reverse the judgment of the Circuit Court upon the ground that the fees demanded in this case pursuant to Chapter 132 Revised Laws of Hawaii 1925, are disproportionate to and bear no relation to the cost of investigation of the business of appellant, and that said fees are arbitrary, unreasonable, excessive, discriminatory and void under the Fifth Amendment to the Constitution of the United States.

---

\*<sup>(2)</sup>The Public Utilities Commission of the Territory of Hawaii is hereinafter referred to as "the Public Utilities Commission."

Assignment No. 5.

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court upon the ground that the fees demanded in this case pursuant to Chapter 132 Revised Laws of Hawaii 1925, are disproportionate to and bear no relation to the cost of investigation of the business of appellant, and that said fees are arbitrary, unreasonable, excessive, discriminatory and void under the Fourteenth Amendment to the Constitution of the United States.

Assignment No. 6.

The Supreme Court of the Territory of Hawaii, having affirmed the finding of the Circuit Court in accordance with the uncontradicted evidence 'that the Public Utilities Commission made no investigation and incurred no expense in investigating, supervising or regulating appellant during the years in question, erred in not holding the fees demanded of appellant in this case pursuant to [317] Chapter 132 Revised Laws of Hawaii 1925 arbitrary, excessive, unreasonable, discriminatory and void under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Assignment No. 7.

The Supreme Court of the Territory of Hawaii erred in holding that although Chapter 132 Revised Laws of Hawaii 1925 imposes fees upon appellant and many other unrelated public utilities, which fees makes up a common fund to defray the ex-

penses of regulating, supervising and investigating utilities generally, the burden of proof is on the appellant to show that the fees demanded of it did not exceed the cost of investigating and supervising it.

**Assignment No. 8.**

The Supreme Court of the Territory of Hawaii, having affirmed the finding of the Circuit Court that no expenses were incurred by the Public Utilities Commission in investigating, supervising or regulating the business of appellant, erred in ruling that it was bound by the legislative determination that the amount of the fees demanded in this case against appellant were reasonable.

**Assignment No. 9.**

The Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the Circuit Court for the reason that Chapter 132 Revised Laws of Hawaii [318] 1925 imposes fees on appellant and many other unrelated public utilities to pay not only the expenses incident to their supervision and regulation, but also the expenses of many duties and activities of the Public Utilities Commission which are not regulatory in nature but are administrative, police or judicial, the expense of which can not be imposed upon appellant under the guise of a regulatory or supervisory fee under the Fifth and Fourteenth Amendments to the Constitution of the United States.



Assignment No. 10.

The Supreme Court of the Territory of Hawaii erred in ruling that the mere existence of the Public Utilities Commission alone was sufficient justification under the Fifth and Fourteenth Amendments to the Constitution of the United States for collecting from appellant the fees demanded in this case.

Assignment No. 11.

The Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the Circuit Court for the reason that the fees demanded in this case bear no relation to the cost of investigation of the appellant's business, are arbitrary, unreasonable, excessive, discriminatory, void, and impose a burden upon interstate and foreign commerce, in violation of Article I, Section 8, Clause 3, of the Constitution of the United States. [319]

Assignment No. 12.

The Supreme Court of the Territory of Hawaii, having found that the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925 impinged in part upon the business of the appellant in the carriage of goods as a part of a continuous journey between ports of the Territory of Hawaii and the mainland of the United States and foreign countries, erred in not reversing the judgment of the Circuit Court for the reason that no distinction was made or contemplated by said chapter, as administratively applied in this case, between local commerce and inter-

state or foreign commerce, and therefore said chapter as applied to appellant in this case is contrary to Article I, Section 8, Clause 3, of the Constitution of the United States, and void.

Assignment No. 13.

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court in part as to the fees measured by the gross receipts from appellant's business in the carriage of goods in interstate and foreign commerce.

Assignment No. 14.

The Supreme Court of the Territory of Hawaii, having affirmed the finding of the Circuit Court to the effect that seventy-five per cent of appellant's gross receipts was derived from the carriage of goods in interstate [320] and foreign commerce business of appellant, erred in failing to reverse the judgment of the Circuit Court for the reason that as a matter of statutory construction appellant was not liable for the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925.

Assignment No. 15.

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court for the reason that the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925 were levied in part upon the gross receipts of appellant derived from the carriage of goods as a part of a continuous journey from the ports of the Territory

of Hawaii to foreign countries, and were therefore invalid under Article I, Section 9, Clause 5, of the Constitution of the United States.

**Assignment No. 16.**

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court for the reason that the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925 were levied in part upon the gross receipts of appellant from the carriage of imports and exports on a continuous journey to and from ports of the Territory of Hawaii to foreign countries, and were therefore invalid under Article I, Section 10, Clause 2, of the Constitution of the United States. [321]

**Assignment No. 17.**

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court for the reason that the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925 impinged in part upon the gross receipts from the carriage of imports and exports between the Territory of Hawaii and foreign countries, and as a matter of statutory construction of said chapter appellant was not subject to the provisions thereof.

**Assignment No. 18.**

The Supreme Court of the Territory of Hawaii, having affirmed the finding of the Circuit Court in accordance with the uncontradicted evidence that the Public Utilities Commission incurred no ex-

pense in investigating, supervising or regulating appellant during the years in question, erred in not holding the fees demanded of appellant in this case pursuant to Chapter 132 Revised Laws of Hawaii 1925 arbitrary, excessive, unreasonable, discriminatory and void as in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

Assignment No. 19.

The Supreme Court of the Territory of Hawaii erred in failing to reverse the judgment of the Circuit Court upon the ground that the fees sought to be collected in this case impose a burden upon commerce between the [322] Territory of Hawaii and the mainland of the United States and foreign nations, in violation of Article IV, Section 3, Clause 2, of the Constitution of the United States.

Assignment No. 20.

The Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the Circuit Court on the ground that the fees prescribed by Chapter 132 Revised Laws of Hawaii 1925, at least in part, burden a federal instrumentality, since they are levied upon the gross receipts of the appellant derived from the carriage of mails and the performance of services for the United States of America, and are therefore unconstitutional and void.

Assignment No. 21.

The Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the Circuit

Court for the reason that Chapter 132 Revised Laws of Hawaii 1925 imposes fees on appellant, and many other unrelated public utilities, to pay not only the expenses incident to their supervision and regulation, but also the expenses of many duties and activities of the Public Utilities Commission which are not regulatory in nature but are administrative, police or judicial, the expense of which can not be imposed upon appellant under the guise of a regulatory or supervisory fee, under Article I, Section 8, Clause 3, of the Constitution of the United States. [323]

**Assignment No. 22**

The Supreme Court of the Territory of Hawaii erred in allowing interest on the principal sued for.

Wherefore, appellant prays that the judgment of the Supreme Court of the Territory of Hawaii entered January 21, 1937, be reversed, and for such other and further relief as may be proper.

Dated, Honolulu, Hawaii, April 2, 1937.

**ROBERTSON, CASTLE & ANTHONY**

By **J. G. ANTHONY**

**Attorneys for Inter-Island Steam  
Nagivation Company, Limited,  
Appellant.**



Service of a copy of the foregoing Assignment of Errors is hereby admitted this 2nd day of April, 1937.

**SMITH, WILD, BEEBE & CADES**

By **D. EDMONDSON**

Attorneys for Public Utilities

Commission of the Territory of  
Hawaii. [324]

---

In the Supreme Court of the Territory of Hawaii.  
[Title of Cause.]

**ORDER ALLOWING APPEAL AND  
FIXING AMOUNT OF BOND**

[Endorsed]: Filed April 2, 1937. [325]

Upon reading and filing the verified petition for appeal and assignment of errors presented to this Court by Inter-Island Steam Navigation Company, Limited, in which it prays that an appeal may be allowed it to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of this Court made and entered in the above entitled court and cause on January 21, 1937, wherein it is alleged that manifest and material errors have occurred, to the end that said errors, if any there be, may be speedily corrected and justice done in the premises;

It is hereby ordered, that said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed,

and said Inter-Island [326] Steam Navigation Company, Limited, is ordered to file with the Clerk of this Court an approved bond in the penal sum of two hundred fifty dollars (\$250.), conditioned that it will prosecute said appeal to conclusion and answer all damages and pay all costs if it fails to make good its said appeal.

Dated, Honolulu, Hawaii, April 2, 1937.

[Seal]

JAS. J. BANKS,

Acting Chief Justice of the  
Supreme Court of the Terri-  
tory of Hawaii.

Attest:

ROBERT PARKER, JR.

Clerk

Service of a copy of the foregoing order allowing appeal and fixing amount of bond is hereby admitted this 2 day of April, 1937.

SMITH, WILD, BEEBE & CADES

By C. A. GREGORY

Attorneys for Public Utilities  
Commission of the Territory of  
Hawaii. [327]

In the Supreme Court of the Territory of Hawaii  
[Title of Cause.]

**BOND ON APPEAL**

•[Endorsed]: Filed April 2, 1937. [328]

Know all men by these presents: That Inter-Island Steam Navigation Company, Limited, as principal, and Stanley C. Kennedy and Henry S. Turner, of Honolulu, Territory of Hawaii, as sureties, are held and firmly bound unto the Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, in the Penal sum of \$250.00, for the payment of which, well and truly to be made to the said Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, the said Inter-Island Steam Navigation Company, Limited, as principal, and Stanley C. Kennedy and Henry S. Turner, as sureties, by these presents do bind themselves, their respective successors, heirs, executors, administrators and [329] assigns, jointly and severally and firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principal has filed its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above entitled cause by the Supreme Court of the Territory of Hawaii;

Now, therefore, if the said principal shall prosecute its appeal with effect, and answer all damages

and costs if it fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, the said Inter-Island Steam Navigation Company, Limited, has caused its name to be signed and corporate seal affixed by its proper officers thereunto duly authorized, and the said Stanley C. Kennedy and Henry S. Turner, as sureties, have hereunto set their hands this 2nd day of April, 1937.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,

[Seal] By (s) STANLEY C. KENNEDY

its President

And (s) HENRY S. TURNER

its Treasurer

Principal

(s) STANLEY C. KENNEDY

(s) HENRY S. TURNER

Sureties [330]

Territory of Hawaii,  
City and County of Honolulu—ss.

Stanley C. Kennedy and Henry S. Turner, being first duly sworn, under oath depose and say: That they are sureties on the foregoing bond; that they are residents of Honolulu, Territory of Hawaii, and they have property situated within said Territory subject to execution and that they are worth in such property more than double the amount of the

penalty specified in said bond, over and above all of their just debts and liabilities and property exempt from execution.

(s) STANLEY C. KENNEDY

(s) HENRY S. TURNER

Subscribed and sworn to before me this 2nd day of April, 1937.

[Seal] (s) MADELINE L. HAYDEN

Notary Public, First Judicial Circuit, Territory of Hawaii.

The foregoing Bond is hereby approved as to form, amount, and sufficiency of sureties.

[Seal] (s) JAS. J. BANKS

Acting Chief Justice, Supreme Court of the Territory of Hawaii.

Attest:

(s) ROBERT PARKER, JR.

Clerk, Supreme Court of the Territory of Hawaii.

[331]

In the Supreme Court of the Territory of Hawaii.

[Title of Cause.]

#### CITATION ON APPEAL

[Endorsed]: Filed April 2, 1937. [332]

The United States of America—ss.

The President of The United States of America to the Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, and to Smith, Wild, Beebe & Cades, its attorneys,  
Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States



Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal duly allowed and filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii on April 2, 1937, in said cause, wherein Inter-Island Steam Navigation Company, Limited, is appellant and you are appellee, [333] to show cause, if any there may be, why the final judgment made and entered in the Supreme Court of the Territory of Hawaii on January 21, 1937, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles Evan Hughes, Chief Justice of the Supreme Court of the United States of America, this 2nd day of April, 1937.

[Seal]

JAS. J. BANKS

Acting Chief Justice, Supreme Court of the Territory of Hawaii.

Attest:

ROBERT PARKER, JR.

Clerk, Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing Citation on Appeal is hereby admitted this 2 day of April, 1937.

SMITH, WILD, BEEBE &

CADES

By C. A. GREGORY

Attorneys for Public Utilities Commission of the Territory of Hawaii. [334]

In the Supreme Court of the Territory of Hawaii.  
[Title of Cause.]

**PRAECIPE**

[Endorsed]: Filed April 2, 1937. [335]

To: Robert Parker, Jr., Clerk of the Supreme Court  
of the Territory of Hawaii:

You will please prepare a transcript of the record  
in the above entitled cause, to be filed in the office  
of the Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit, and include in said  
transcript the following papers on file in said cause  
to-wit:

- 1) Plaintiff's complaint;
- 2) Amended demurrer, dated September 17,  
1930;
- 3) Reservation to Supreme Court, record.  
Clerk's certificate, dated October 1, 1930;
- 4) Decision of Supreme Court of the Territory  
of Hawaii, dated October 8, 1931, 32 Hawaii 127;
- 5) Order overruling demurrer; [336]
- 6) Defendant's amended answer, filed Novem-  
ber 2, 1933;
- 7) Special demurrer, filed January 6, 1934;
- 8) Stipulation of counsel, filed April 6, 1933;
- 9) Decision of Honorable A. M. Cristy, Judge,  
Circuit Court, First Circuit, filed April 12, 1934,  
and amended April 14, 1934;
- 10) Exception to decisions;
- 11) Judgment of First Circuit Court filed  
April 20, 1934;
- 12) Exception to judgment;

- 13) All exhibits, including exhibits marked for identification;
- 14) Clerk's minutes, First Circuit Court.
- 15) Transcript of testimony;
- 16) Application for writ of error to the judgment of the First Circuit Court, and notice;
- 17) Writ of error filed in Supreme Court, Territory of Hawaii;
- 18) Assignment of errors to the judgment of the First Circuit Court;
- 19) Stipulation for deposit of cash bond in lieu of surety bond on writ of error, and receipt of Clerk for the cash deposit pursuant to said stipulation;
- 20) Decision of Supreme Court filed July 25, 1936;
- 21) Judgment of Supreme Court filed January 21, 1937;
- 22) Clerk's minutes, Supreme Court;
- 23) Petition for Appeal;
- 24) Assignment of Errors;
- 25) Order Allowing Appeal;
- 26) Bond on appeal; [337]
- 27) Citation on appeal;
- 28) All orders enlarging time to docket cause in the Ninth Circuit Court of Appeals; and
- 29) This praecipe.

Dated, Honolulu, Hawaii, April 2, 1937.

ROBERTSON, CASTLE &

ANTHONY

By J. G. ANTHONY

Attorneys for Inter-Island Steam Navigation Company, Limited.

Service of a copy of the foregoing praecipe is hereby admitted this 2 day of April, 1937.

SMITH, WILD, BEEBE &  
CADES

By C. A. GREGORY  
Attorneys for Public Utilities Commission of the  
Territory of Hawaii. [338]

---

In the Supreme Court of the Territory of Hawaii.  
October Term, 1936

[Title of Cause.]

CLERK'S CERTIFICATE

I, Robert Parker, Jr., Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for appeal filed April 2, 1937, the original whereof is attached to the foregoing transcript of record, being pages 309 to 313, both inclusive, and in pursuance to the praecipe filed April 2, 1937, the original whereof is attached to the foregoing transcript of record, being pages 335 to 338, both inclusive,

Do Hereby Transmit to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 4 to 308, both inclusive, pages 328 to 33, both inclusive, and I Certify the same to be full, true and correct copies of the originals, which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the above entitled causes, Numbers 1984 and 2174. [339]

I Further Certify that the original assignment of errors, filed April 2, 1937, pages 314 to 324, both inclusive, original order allowing appeal and fixing amount of bond, filed April 2, 1937, pages 325 to 327, both inclusive; original citation on appeal, filed April 2, 1937, pages 332 to 334, both inclusive, are herewith returned.

I Do Further Certify that the original orders enlarging time to file record and docketing said cause were transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

I Lastly Certify that the cost of the foregoing transcript of record is \$216.45, and the said amount has been paid by Robertson, Castle & Anthony, attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, City and County of Honolulu, this 28th day of May, 1937.

[Seal]

ROBERT PARKER, JR.

Clerk of the Supreme Court of the Territory of Hawaii. [340]



No. 8569

In the United States Circuit Court of Appeals  
for the Ninth Circuit

INTER-ISLAND STEAM NAVIGATION COM-  
PANY, LIMITED, a Hawaiian corporation,  
Appellant,

vs.

THE TERRITORY OF HAWAII by the Public  
Utilities Commission of the Territory of  
Hawaii,

Appellee.

**STIPULATION RE PRINTING OF RECORD**

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that plaintiff's complaint and defendant's amended demurrer appearing on pages 17 to 26 inclusive of the typewritten record on appeal in the above entitled cause, transmitted to the above entitled court by the clerk of the Supreme Court of the Territory of Hawaii, need not be printed since said pleadings are a duplication of pages 4 to 10 inclusive and 11 to 13 inclusive of said typewritten record, and the pleadings therein set forth will appear in the printed record in the above entitled cause.

Dated: Honolulu, Hawaii, June 24, 1937.

ROBERTSON, CASTLE &  
ANTHONY

By J. G. ANTHONY

Attorneys for Appellant.

SMITH, WILD, BEEBE &  
CADES

By J. RUSSELL CADES

Attorneys for Appellee.

The foregoing Stipulation is hereby approved.

FRANCIS A. GARRECHT

Circuit Judge.

[Endorsed]: Filed July 1, 1937. Paul P. O'Brien,  
Clerk.

---

[Endorsed]: No. 8569. United States Circuit Court of Appeals for the Ninth Circuit. Inter-Island Steam Navigation Company, Limited, Appellant, vs. Territory of Hawaii, by the Public Utilities Commission of the Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed: June 4, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



No. 8569

---

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

**INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,**

**Appellant,**

**vs.**

**TERRITORY OF HAWAII, by the Public Utili-  
ties Commission of the Territory of Hawaii,  
Appellee.**

---

**Upon Appeal from the Supreme Court of the  
Territory of Hawaii.**

---

**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**





United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, March 8,  
1938.

Before: Garrecht, Mathews and Haney,  
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. J. G. Anthony, counsel for appellant, and by Mr. J. Russell Cades, counsel for appellee, and submitted to the court for consideration and decision.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Saturday, April 16,  
1938.

Before: Garrecht, Mathews and Haney,  
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION  
AND CONCURRENCE, AND FILING AND  
RECORDING OF JUDGMENT.

By direction of the court, ordered that the type-written opinion this day rendered by this court in above cause—and concurrence of Circuit Judge Mathews in the result thereof—be forthwith filed by

the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinions rendered.

---

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the Supreme Court of the  
Territory of Hawaii.

### OPINION

Before: Garrecht, Mathews and Haney,  
Circuit Judges.

Haney, Circuit Judge.

The applicability and validity of an act of the Territory of Hawaii levying fees on public utilities are here involved.

Appellant is a corporation duly organized prior to 1913 under the laws of the Kingdom of Hawaii, a political predecessor of the Territory of Hawaii. It is a common carrier, having owned and still owning, controlling and operating numerous vessels and other property incidental to the transportation of passengers and freight exclusively between the different parts of the Territory.

Appellee is the Public Utilities Commission of the Territory, created by Act 89 of the Session Laws of Hawaii, 1913 (p. 121), approved April 19, 1913 (§§ 2189-2210, Rev. L. of Hawaii, 1925). Among the powers conferred on appellee is that of investigation. Under § 5, such power extends to the condition of each utility and the manner in which it is

operated, with reference to the safety or accommodation of the public; the safety, working hours and wages of its employees; fares and rates charged by it; the value of its physical property; issuance of stocks and bonds by it and the disposition of the proceeds thereof; amount and disposition of its income; its financial transactions; its business relations with others; its compliance with territorial and federal laws, and of its franchise, charter and articles of association; its classifications, rules, regulations, practices and service; and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

In § 13 it is provided appellee should have the power to investigate such matters even though such matters were within the jurisdiction "of the Interstate Commerce Commission \* \* \* or other body". It is further provided that institution of appropriate proceedings for relief before the "Interstate Commerce Commission \* \* \* or other body" is appellee's duty.

Appellee's investigatory powers, by § 6, extend to books, records, contracts, maps and other documents, and by § 7, to accidents and the causes thereof.

By § 14, it is provided that all rates and fares observed by any public utility must be "just and reasonable" and that the commission had the power "in so far as it is not prevented by the Constitution or Laws of the United States" to regulate, fix and

change such rates and fares. Section 18 defined "public utility" to mean and include "every \* \* \* corporation \* \* \* which may own, control, operate \* \* \* whether under a franchise, charter, license \* \* \* or otherwise, any plant or equipment \* \* \* directly or indirectly, for public use, for the transportation of passengers or freight \* \* \*". Section 20 of the act provided that it "shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and Laws of the United States. \* \* \*". Section 21 of the act provided that it would take effect on July 1, 1913.

Section 17 of the foregoing act was amended by Act 127 of the same Session Laws, approved and effective April 28, 1913. That section took effect as a part of the original act, and provided for the fees in question. So far as it is here material, that section provides (Session Laws of Hawaii, 1913, p. 184):

"\* \* \* There shall also be paid to the commission in each of the months of March and September, in each year by each public utility which is subject to investigation, by the commission a fee which shall be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in this Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such

public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in this Territory. Such fee shall likewise be deposited in the treasury to the credit of said fund [Public Utilities Commission Fund]. The moneys in said fund are hereby appropriated for the payment of all salaries, wages and expenses authorized or prescribed of this Act."

On April 29, 1913 (one day after approval of Act 127, which amended the original act of April 19, 1913) Act 135 was approved, to become effective upon its approval by the Congress of the United States<sup>1</sup> The Act of March 28, 1916, Ch. 53 (39 Stat. 38) approved the last mentioned territorial act, but made additions thereto. The territorial act, with the additions of Congress italicized, is in part:

"The franchises granted by [various territorial acts approved by Congress] *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii*, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred

<sup>1</sup>Approval by Congress was specified, apparently pursuant to §55 of the Hawaiian Organic Act (48 USCA §562).



and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory \* \* \* *Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce \* \* \** [Italics are by the Court].

The Shipping Act of 1916 (Act of September 7, 1916, Ch. 451, 39 Stat. 728) created the United States Shipping Board. Section 1 of that act provided in part:

“When used in this chapter:

“The term ‘common carrier by water in foreign commerce’ means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade \* \* \*

The term ‘common carrier by water in interstate commerce’ means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same

Territory, District, or possession." (46 USCA §801).

Section 18 (46 USCA §817) provides that every "common carrier by water in interstate commerce" shall establish just and reasonable rates and fares and shall file with the Board such rates and fares, and gives to the Board power to prescribe and order reasonable rates and fares if it finds those established by such carrier are unjust or unreasonable. The Board is also given investigatory powers by 46 USCA §§812, 814, 815, 816, 817, and 820.

On September 28, 1917, appellee ordered appellant to reduce its charges for passengers and freight. Appellant appealed to the Supreme Court of the Territory which held appellant to be a "common carrier by water in interstate commerce", within the provisions of the Shipping Act; that since Congress had acted, appellee was "excluded from exercising such regulation", and that therefore appellee had no jurisdiction to make the order. 24 Haw. 136, 144, 146, 148.

Appellant paid the fees prescribed by §17 of the act creating the commission for the years 1913 to 1922 in the total sum of \$26,572.79. It did not pay any fees for the years 1923 to 1930. On June 1, 1930, appellee filed an action in the Circuit Court of the Territory, against appellant to recover the fees for those years, totalling \$33,724.44. This sum consisted of the following items:

Year	Gross Receipts Tax	Capital Stock Tax	Dues Semi-Annually	Total for Year
1923	\$ 934.50	\$1,000.00	\$1,934.50	\$3,869.00
1924	1,013.78	1,000.00	2,013.78	4,027.56
1925	1,085.92	1,000.00	2,085.92	4,171.84
1926	1,066.15	1,130.00	2,096.15	4,192.30
1927	1,154.85	1,076.00	2,230.85	4,461.70
1928	1,282.80	1,188.00	2,470.80	4,941.60
1929	1,356.51	1,300.00	2,656.51	5,313.02
1930	1,447.42	1,300.00	2,747.42	2,747.42 <sup>1</sup>
Totals	\$9,341.93	\$8,894.00	\$18,235.93	\$33,724.44

Appellant filed an amended demurrer. The Circuit Court reserved the questions of law arising for the consideration of the Supreme Court of the Territory, pursuant to §2513, Rev. L. of 1925. On October 8, 1931, the Supreme Court held that the "power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom it may see fit to regulate", and that since "the power to investigate exists, the power to exact fees to defray the expenses of such investigations follows". 32 Haw. 127.

Thereafter the amended demurrer was overruled, and appellant filed an amended answer. The parties stipulated, among other facts, related above that

"\* \* \* the commission during the years 1923 to 1930 inclusive has performed no services spe-

<sup>1</sup>Payment for September not due when the action was filed.

cifically on behalf of the defendant and has made no investigation of the defendant except from time to time it has examined the defendant's books to determine the amount of its gross income and the amount of its capital stock outstanding for the purpose of determining the amount of fees to be due; that from and after August 7th, 1923, the defendant has made no report to the commission of accidents and no complaints have been filed with the commission against the defendant requiring investigations

\* \* \*

The Circuit Court found that the only service rendered by appellee which could be characterized as one "on behalf of" appellant, was one "in which the auditor of the commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed \$30.00 gross"; that the examinations so made were "on three separate occasions of one-half hour each". The Circuit Court further found that 75% of appellant's "annual gross receipts for freight" are derived from transporting (1) sugar and other freight, consigned through Honolulu to mainland or foreign ports, from various territorial ports to Honolulu for such trans-shipment without material break in the through-journey; or (2) freight, consigned to territorial ports other than the Honolulu port from mainland or foreign ports, from Honolulu to such ports of destination; or (3) mail and rendering other services directly to the United States government.

The Circuit Court rendered judgment for appellee in the sum of \$53,435.55, consisting of the amount of the fees (\$33,724.44) and interest (\$19,711.11). On appeal the Supreme Court affirmed the judgment, saying: "The record discloses and it was found by the court below to be a fact that 75% of defendant's gross annual freight receipts was derived from freight carried by it in commerce with foreign nations and among the several States." It also approved the Circuit Court's finding with respect to services rendered by the Commission. Appellant has brought the case here by appeal.

Appellant contends that §20 of the act creating the commission expressly excluded appellant from its operation because it was engaged in interstate and foreign commerce. The section, we think, does not so provide. Appellant is excluded "except in so far as the same may be permitted under the Constitution and Laws of the United States." In this connection appellee seems to contend that appellant was not engaged in interstate or foreign commerce within the meaning of the commerce clause in the Constitution. In addition to the findings of the courts below, the evidence concerning the nature of appellant's business disclosed receipts as follows:



Year	Freight Revenue	U. S. Mail Revenue	Other Revenue	Total Revenue
1922	\$1,078,517	\$ 68,724	\$ 721,757	\$ 1,868,998
1923	1,167,230	70,098	790,234	2,027,562
1924	1,235,313	70,098	866,444	2,171,855
1925	1,234,624	70,098	827,570	2,132,292
1926	1,293,035	85,299	883,887	2,262,221
1927	1,404,079	100,499	964,571	2,469,149
1928	1,425,373	100,480	1,053,027	2,578,880
1929	1,483,388	99,599	1,120,195	2,703,182
Totals	\$10,321,559	\$664,895	\$7,227,685	\$18,214,139

At the trial the parties orally stipulated that 75% of the freight revenues came from one of the three sources mentioned in the trial court's finding, related above. Based on this stipulated percentage, the amount of freight coming within the three classes, and its percentage of the total revenue is as follows:

Year	Amount	Percentage of Total Revenue
1922	\$ 808,887	43%
1923	875,421	43%
1924	926,484	42%
1925	925,968	43%
1926	926,774	42%
1927	1,053,057	42%
1928	1,069,029	41%
1929	1,112,541	41%
Period average	\$ 962,270	42.2%

Appellant relies on the principle that its transportation was a local part of the whole journey, and was therefore a part of interstate or foreign commerce. See: *Galveston, Harrisburg etc. Ry. Co. v.*

Texas, 210 U. S. 217; Atchison & Topeka Ry. v. Harold, 241 U. S. 371; Carson Petroleum Co. v. Vial, 279 U. S. 95.

The Supreme Court drew a distinction between "interstate commerce" and "Commerce \* \* \* among the several States" as used in §8 of Article I of the Constitution. It is not clear as to whether or not appellee relies on such distinction. Inasmuch as it has been said that "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines" (Galveston, Harrisburg etc. Ry. Co. v. Texas, *supra*, 225), we think, as a practical matter, a territory must be considered in the same category as a state, and that the commerce clause is applicable to such territory.<sup>2</sup> If that point was not expressly so decided in *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, and *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, it was so implied. Cf. *Lugo v. Suszo* (CCA 1), 59 F(2d) 386, 390.

The conclusion thus expressed seems to be strengthened by §5 of the Hawaiian Organic Act (48 USCA §495) which provides:

---

<sup>2</sup>That commerce among the several states is not a technical but a practical conception has been said many times. *Swift and Company v. United States*, 196 U. S. 375, 398; *Savage v. Jones*, 225 U. S. 501, 520; *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 89; *United States v. Reading Co.*, 226 U. S. 324, 368; *Davis v. Virginia*, 236 U. S. 697, 698; *Public Utilities Comm. v. Landon*, 249 U. S. 236, 245.

"The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the Territory of Hawaii as elsewhere in the United States

\* \* \*

Unless Congress would remove regulation of intra-territorial commerce from the effect of that provision, it would seem that it would restrict Congressional action with regard to such commerce.

Appellee contends that appellant's part of the transportation was separable. We think the controlling rule is found in *The Daniel Ball*, 77 U. S. (10 Wall.) 557, where the court said (p. 565):

"\* \* \* In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michi-

gan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

See also, *United States v. California*, 297 U. S. 175, 182. We think, therefore, that appellant was engaged in part, at least, in "Commerce with foreign Nations, and among the several states". As such it was subject to regulation by Congress under §8, Article I of the Constitution.

Appellee contends that Congress expressly ratified the act creating the commission by its Act of March 28, 1916. Appellant seems not to differ with that view, and we may here assume that Congress did consent to regulation of interstate and foreign commerce within the Territory by appellee. But it is obvious that some five months later Congress withdrew its consent to regulation of such com-

merce, in particulars hereinafter discussed, by enactment of the Shipping Act. The effect of such action by Congress is explained by the following from Second Employers' Liability Cases, 223 U. S. 1, 55:

"\* \* \* The inaction of Congress, however, in no wise affected its power over the subject \* \* \* And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is \* \* \*"

To the same effect, see *Chi., R. I. etc. Ry. v. Hardwick Elevator Co.*, 226 U. S. 426, 435.

The exclusive effect of Congressional action is quite clear. Thus in the case last cited, it is said that "there can be no divided authority over interstate commerce". The states may not "complement" the act of Congress, or prescribe "additional regulations" or "auxiliary provisions for the same purpose" (*Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 536, 617; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 153), nor "supplement" such act.

Appellant contends that the Shipping Act entirely superseded the territorial act creating the commission. Appellee contends to the contrary, but concedes that it has no power to fix or regulate rates. Appellee contends that the territorial act gave it power to investigate (as the Supreme Court held) and that that power was not superseded.

It was early held, and has since been followed that Congress had no power to regulate purely



intrastate commerce, a matter reserved to the states. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 195; *License Tax Cases*, 72 U. S. (5 Wall.) 462, 470; *Kidd v. Pearson*, 128 U. S. 1, 17; *Carter v. Carter Coal Co.*, 298 U. S. 238, 298, et seq.; *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 30. The limits of the reservation are shown by *The Minnesota Rate Cases*, 230 U. S. 352, 399, where it was said:

“\* \* \* This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere \* \* \*

More recently, it was said in *Labor Board v. Jones & Laughlin*, supra, 37: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control". See also: *Houston & Texas Ry. v. United States*, 234 U. S. 342, 351.

We may assume (without so deciding), that the provisions of the Shipping Act cited, cover all the matters mentioned in the territorial act, with respect to interstate commerce. In other words, insofar as the matters mentioned in the territorial act relate to interstate commerce, the territorial act was superseded by the Shipping Act; but it does not follow that the same matters in the territorial act, insofar as they related to intrastate commerce, meaning, when used herein, commerce entirely within the territory, were also acquired by the Shipping Board. The Shipping Board would acquire exclusive power over such matters only "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that [interstate] commerce from burdens and obstructions."

There is nothing in the record which discloses that the intrastate matters mentioned in the territorial act bear such a close relationship to the interstate matters over which the Board has jurisdiction. In *United States Nav. Co. v. Cunard S. S. Co.*, 284

U. S. 474, 481, it is held that the Shipping Act "closely parallels the Interstate Commerce Act; and \* \* \* Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." In *Arkansas Comm. v. Chicago, etc. R. R.*, 274 U. S. 597, 603, a case involving the Interstate Commerce Commission, it was held:

"The intention to interfere with the state function of regulating rates is not to be presumed. Where there is serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power \* \* \*"

Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce.

However, appellant urges that the fees are invalid since they are laid on the receipts from interstate commerce, and are therefore an attempt to regulate it. That fact alone, is insufficient to invalidate the exaction, we think. In *Gt. Northern Ry. v. Washington*, 300 U. S. 154, where a similar fee was involved, the court said (p. 160):

"The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposi-

tion of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution \* \* \*

Continuing, it was said in that case:

“\* \* \* A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable. If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment \* \* \*

It was there held that the burden of showing reasonableness rested on the state where interstate commerce is directly affected. On the basis of that reasoning, appellant contends that the fees exacted were “unreasonable and disproportionate to the service”, and that appellee had not carried its burden. We believe appellee “must be deemed to have sustained that burden”, as stated in *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 187. There is here no charge that the exaction is to be used for a purpose other than the legitimate one of supervision and regulation. For the eighteen year period beginning with the year 1913, appellee has received fees totalling \$273,470.40, and interest and miscellaneous receipts in the sum of \$3,684.80. Against the total of those sums, \$277,155.20, for the same period it has had disbursements of \$297,578.72. We believe it to be immaterial that from 60% to 80% of those disbursements were made with respect to utilities

not engaged in interstate commerce. A citizen of a city paying taxes to support a police force, cannot avoid payment of the tax on the ground that he has not used the services of the police.

In view of the deficit, appellee has been able to meet the disbursements only by receipt of legislative appropriations. During the 18 year period, there have been five such appropriations, totalling \$38,182.61. Had appellant paid its fees there probably would have been no necessity for the appropriations. Had appellant paid the fees, the excess of receipts over disbursements would have been \$13,300.92, excluding the appropriations, for the 18 year period. The excess is insufficient to show that the fees are unreasonable or disproportionate. Cf. *Bourjois, Inc. v. Chapman*, supra, 188.

It is next contended that the fees are an unconstitutional burden on imports and exports. Article I, Section 9, of the Constitution, provides that "No Tax or Duty shall be laid on articles exported from any State." Article I, Section 10, provides: "No State shall, without the Consent of the Congress, lay any Imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws \* \* \*" Appellant says that these clauses "forbid not only property taxes but any fees, charges or occupation taxes which in substance and effect burden imports or exports". See: *Anglo-Chilean Corp. v. Alabama*, 288 U. S. 218, 227. Assuming, without deciding, that the clauses are applicable to a Territory, we think such a rule has no application here. The fees are not laid



on the property imported or exported, on the proceeds thereof, or on the privilege of importing or exporting. The fact that appellant must pay a fee based on receipts from transporting articles imported and exported by others, has only an indirect and remote effect, if any on the imports and exports. Compare, *McLean v. Denver & Rio Grande R. R. Co.*, *supra*, 49.

Inasmuch as 5% of appellant's receipts are derived from the carriage of the mails and other services for the United States, appellant contends that the fees are a burden on an instrumentality of the United States, and are void. We are of the opinion that the fees affected, only remotely, the operations of the United States. *Alward v. Johnson*, 282 U. S. 509, 514.

Affirmed.

Mathews, Circuit Judge, concurs in the result.

[Endorsed]: Opinion and Concurrence. Filed Apr. 16, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8569

INTER-ISLAND STEAM NAVIGATION COM-  
PANY, Limited,

Appellant,

v.

TERRITORY OF HAWAII, etc.,

Appellee.

JUDGMENT

Upon Appeal from the Supreme Court for the Territory of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the Supreme Court for the Territory of Hawaii and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It Is Further Ordered and Adjudged by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 16, 1938.  
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred thirty-eight (338) pages, numbered from and including 1 to and including 338, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3rd day of May, A. D. 1938.

[Seal]

PAUL P. O'BRIEN,

Clerk.

[fol. 340] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

**FILE COPY**

Office - Supreme Court, U. S.

~~FILED~~

JUN 6 1938

CHARLES ELMORE GROPLEY  
CLERK

In the Supreme Court of the  
United States.

OCTOBER 1937 TERM

No. **94**

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,

*Petitioner,*

vs.

TERRITORY OF HAWAII by Public  
Utilities Commission of the Ter-  
ritory of Hawaii,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit  
and Supporting Brief

J. GARNER ANTHONY  
*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY  
Honolulu, Hawaii  
*Of Counsel.*

## Subject Index

	Page
PETITION FOR WRIT	1
Summary Statement of Matter Involved.....	2
Opinions Below .....	11
Jurisdiction .....	11
Questions Presented.....	11
Reasons for Allowance of Writ.....	12
Prayer for Writ.....	16
BRIEF IN SUPPORT OF PETITION	18
Errors to be Urged.....	18
Argument .....	19
POINT I.	
The Inspection Fees Demanded Admittedly Bear No Relation to the Cost of Inspection or Regulation and, Therefore, Impose Unconstitutional Burdens on Interstate and Foreign Commerce, and are Void Under the Fifth and Fourteenth Amendments.....	19
1. The Territory cannot burden interstate and for- eign commerce .....	20
2. The justification for all inspection fees must rest in the police power.....	21



- |   | Page |
|---|------|
| 3. Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities generally, the burden of proof is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection..... | 23   |
| 4. The uncontradicted evidence is that the Commission has expended nothing for nine years in regulating or inspecting Petitioner; this fact is conclusive that inspection fees of \$4,000.00 per annum are excessive.....   | 24   |
| 5. The fees sought to be collected are so excessive as to amount to a taking of Petitioner's property without due process of law in violation of the Fifth and Fourteenth Amendments.....   | 27   |

## POINT II.

Under the Proper Construction of the Shipping Act, 1916 and the Utility Act the Commission has no Jurisdiction over the Petitioner and cannot collect the Fees Demanded.....	29
Conclusion .....	36

## Table of Authorities Cited

---

### CASES

	Pages
<i>A. &amp; P. Tel. Co. v. Phila.</i> , 190 U.S. 160.....	14, 22
<i>Bourjois, Inc. v. Chapman</i> , 301 U.S. 183, 187.....	15, 24, 25
<i>Chicago R. I. &amp; P. R. Co. v. Hardwick Farmers Elev. Co.</i> , 226 U.S. 426.....	29
<i>Farrington v. Tokushige</i> , 273 U.S. 284, 299.....	27
<i>Foote &amp; Co., Inc. v. Stanley</i> , 232 U.S. 494.....	14, 22, 27
<i>Gloucester Ferry Co. v. Penna.</i> , 114 U.S. 196.....	20
<i>Great Northern Ry. Co. v. State of Washington</i> , 300 U.S. 154.....	14, 15, 22, 23, 24, 25, 26, 27, 36
<i>Hanley v. Kansas City Southern Ry. Co.</i> , 187 U.S. 617 .....	21
<i>I. I. S. N. Co.</i> , 24 Haw. 136, 145.....	5, 29, 34
<i>Kelly v. Washington</i> , 302 U.S. 1.....	5
<i>Lemke v. Farmer's Grain</i> , 258 U.S. 50.....	21
<i>McLean v. Denver &amp; Rio Grande R. R. Co.</i> , 203 U.S. 38 .....	21
<i>Minnesota v. Blasius</i> , 290 U.S. 1.....	20

	Page
<i>Napier v. Atlantic Coast Line R. Co.</i> , 272 U.S. 605, 613 .....	30
<i>New York Central R. R. Co. v. Winfield</i> , 244 U.S. 147, 153 .....	30
<i>Patapsco Guano Co. v. Board of Agriculture</i> , 171 U.S. 343 .....	22
<i>Penn. Railroad v. Public Service Commission</i> , 250 U.S. 566 .....	29
<i>Phila. &amp; S. Mail S. S. Co. v. Pennsylvania</i> , 122 U.S. 326 .....	20
<i>Postal Tel. Cable Co. v. Taylor</i> , 192 U.S. 64 .....	22
<i>Prigg v. Pennsylvania</i> , 41 U.S. (16 Pet.) 536, 617....	30
<i>Savage v. Jones</i> , 225 U.S. 501 .....	21
<i>Simpson v. Shepard</i> , 230 U.S. 352, 397 .....	21
<i>Sprout v. South Bend</i> , 277 U.S. 163 .....	14, 22, 29
<i>Territory v. I. I. S. N. Co.</i> , 32 Haw. 127 .....	6, 11
<i>Territory v. I. I. S. N. Co.</i> , 33 Haw. 890 .....	8, 9, 11
<i>U. S. Nav. Co. v. Cunard S. S. Co.</i> , 284, U.S. 474, 481 .....	29
<i>Western Union v. New Hope</i> , 187 U.S. 419 .....	14, 22

## STATUTES

	Pages
<i>Act of Congress</i> , March 28, 1916 (39 Stat. 38, p. 53).....	32, 33
<i>Hawaiian Organic Act</i> , Sec. 55 (39 Stat. 443).....	32
<i>Judicial Code</i> , Sec. 240(a), as amended by Act of February 13, 1925 (U.S.C.A. Title 28, Sec. 347) ..	11
<i>Merchant Marine Act</i> of 1936 (49 Stat. 1985, U.S.C.A. Title 46, Secs. 1101-1246).....	4
<i>Revised Laws of Hawaii</i> 1925, Chapter 132.....	2
<i>Revised Laws of Hawaii</i> 1925, Sec. 2208.....	3
<i>Revised Laws of Hawaii</i> 1925, Sec. 2193.....	3
<i>Revised Laws of Hawaii</i> 1925, Sec. 2207.....	4, 13
<i>Revised Laws of Hawaii</i> 1925, Sec. 2210.....	34
<i>Session Laws of Hawaii</i> 1913, Act 89, as amended by Act 127 Session Laws of Hawaii 1913.....	2
<i>Session Laws of Hawaii</i> 1913, Act 135.....	7, 33
<i>Shipping Act</i> of 1916 (39 Stat. c. 451, p. 728, U.S.C.A. Title 46, Sec. 801, et seq.).....	2, 4
<i>Washington Session Laws</i> of 1929, Chapter 107.....	14, 23

## INDEX TO APPENDIX

	Page
Ch. 132, <i>Revised Laws of Hawaii</i> 1925.....	i-vj
Act 135, <i>Session Laws</i> of 1913.....	vi-vii
<i>Act of Congress</i> of March 28, 1916 (39 Stat. at L. 38, c. 53).....	viii-x
<i>Shipping Act</i> , 1916 (U.S.C.A., Title 46, Sec. 801, et seq., 39 Stat. at L. c. 451, p. 728).....	xi-xvi



# In the Supreme Court of the United States

OCTOBER 1937 TERM

No. ....

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,

*Petitioner,*

vs.

TERRITORY OF HAWAII by Public  
Utilities Commission of the Ter-  
ritory of Hawaii,

*Respondent.*

**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit**

*To the Honorable, The Supreme Court of the United  
States:*

Inter-Island Steam Navigation Company, Limited,  
prays that a writ of certiorari issue to review the judgment  
(R. 338) of the United States Circuit Court of Appeals  
for the Ninth Circuit made in the above entitled cause on  
April 16, 1938, which affirms the judgment of the Su-  
preme Court of Hawaii dated January 21, 1937 (R. 285).

affirming the judgment of the Circuit Court<sup>(1)</sup> of the First Judicial Circuit, Territory of Hawaii, dated April 20, 1934 (No 66).

#### SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought by the Public Utilities Commission<sup>(2)</sup> of the Territory of Hawaii to recover certain statutory fees claimed to be due from the Petitioner for the years 1922-1930, inclusive, pursuant to Chapter 132,<sup>(3)</sup> Revised Laws of Hawaii 1925 (for convenience this act will be referred to herein as the "Utility Act").

Petitioner challenges the application of the Utility Act to it and also its validity as applied in this cause upon the ground that the fees, a substantial part of which are measured by a fixed percentage of its gross receipts from interstate and foreign commerce, are demanded for a purported inspection service which the Commission is without power to perform and which in fact during the nine years in question it has not performed; that therefore the fees demanded impose an unconstitutional burden on interstate and foreign commerce, are contrary to the commerce clause of the Constitution, are excessive under the due process clauses of the Fifth and Fourteenth Amendments; and that the Utility Act so far as it relates to Petitioner has been superseded by the Shipping Act of 1916.

(1) Referred to herein as "the trial court."

(2) Referred to herein as the "Commission."

(3) The Utility Act was originally Act 89, Session Laws of Hawaii 1913; amended by Act 127 Session Laws of Hawaii 1913, and became Chapter 132 Revised Laws of Hawaii 1925 referred to herein as "Rev. L. Hawaii 1925"; this Chapter is summarized in Appendix, p. I.

The relevant provisions of the Utility Act are:

*Rev. L. Hawaii 1925, Section 2208*

"The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may \* \* \* operate, \* \* \* any plant or equipment \* \* \* for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

*Rev. L. Hawaii 1925, Section 2193*

"The commission \* \* \* shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations.

\* \* \* \*"

*Rev. L. Hawaii 1925, Section 2207*

"\* \* \* all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages, and expenses authorized or prescribed by this chapter."

The Shipping Act of 1916<sup>(1)</sup> vests complete regulatory powers over common carriers by water in the Shipping Board and by its terms was made specifically applicable to transportation on the high seas between the ports of the Territory and hence to Petitioner.

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the

(1) Shipping Act, 1916 became effective September 7, 1916, 39 Stat. c. 451, p. 728; U.S.C.A. Title 46, Sec. 801, 842; it is summarized in Appendix XI; the powers of the Shipping Board have been transferred to the Maritime Commission under the Merchant Marine Act, 1936 (49 Stat. 1985, U.S.C.A. Title 46, Sections 1101-1246).

transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession."

(39 Stat. c. 451, p. 728; U.S.C.A. Title 46, Sec. 801.)

The Supreme Court of Hawaii in 1917 decided that Congress by enactment of the Shipping Act, 1916 had ousted the Commission of any regulatory jurisdiction over this same Company. *In Re: I. I. S. N. Co.* 24 Haw. 136.

Apart from the Shipping Act, 1916 Petitioner is subject to what this Court has called "a maze of regulation." The federal acts<sup>(1)</sup> relating to its operations are "extremely detailed." *Kelly v. Washington*, 302<sup>nd</sup> U.S. 1, 4.

There exists no conflict in the evidence; the facts are set forth in the opinions of the courts below and may be summarized as follows:

The Commission in its complaint filed June 1, 1930 alleges that it was duly constituted under the Utility Act,

(1) The following are the more important federal statutes applicable to Petitioner's business: 46 U.S.C.A. Chap. 14, relating to inspection of steam vessels; 46 U.S.C.A. Chap. 15, relating to transportation of passengers and goods by steam vessels; 46 U.S.C.A. Chap. 24, Merchant Marine Act of 1920; 46 U.S.C.A. Chap. 12, regulating vessels in domestic commerce; it would unduly encumber this petition to refer to the regulations promulgated by the several federal agencies pursuant to this legislation.



that Petitioner, a corporation existing under the laws of Hawaii, operated a number of steam vessels carrying passengers and goods as a common carrier on the high seas between ports of the Territory, and that by virtue of the Utility Act it was obliged to pay to the Commission the fees prescribed by the act (R. 1).

The complaint further alleged that prior to the year 1922 Petitioner paid the statutory fees, but since September 26, 1922, refused to pay; that the computation of the fees for the years 1922 to 1930 based upon one-tenth of one per cent of its annual gross receipts and one-twenty-fifth of one per cent of its outstanding capital stock amounted to \$33,724.44, claimed to be due.

A demurrer was interposed to the complaint setting up that by virtue of the Shipping Act, 1916, which vested complete regulatory and supervisory powers over Petitioner in the United States Shipping Board, the Commission was without power to require the payment of the fees demanded (R. 7). This question was certified to the Supreme Court of Hawaii, which court held that although the Shipping Act, 1916 divested the Commission of all regulatory powers it did not prevent investigation by the Commission, and that "since the power to investigate exists, the power to defray the expenses of such investigation follows." (R. 12, 26; 32 Haw. 127, 128)

The cause was remanded to the trial court for hearing on the merits. The demurrer was overruled and an amended answer filed. Petitioner's answer (R. 29-30) in brief denied liability for the payment of the fees; denied

the jurisdiction of the Commission over its business; alleged that it was engaged in the business of a common carrier by water in interstate and foreign commerce; that the fees demanded constitute an unreasonable burden on the interstate and foreign commerce; that the sum of \$33,724.44 bore no relation to the cost of supervision and inspection, and that no inspection or supervision of it was ever made by the Commission; that the imposition of the fees demanded is repugnant to the Fifth and Fourteenth Amendments to the Constitution; and that the fees demanded under the Utility Act conflict with the Shipping Act, 1916.

The trial court found that 75% of Petitioner's annual gross freight receipts during the years in question (\$10,-321,559., Exhibit CC, R. 74) was from the carriage of goods in a continuous journey in interstate and foreign commerce (R. 55, 56); that during the period in question (1922 to 1930) no investigation of Petitioner had been made by the Commission; that no services had been performed by the Commission on its account or for its benefit; that the only time spent by the Commission upon Petitioner was three one-half hour examinations of its books for the purpose of ascertaining the fees claimed to be due. These facts were stipulated at the trial (R. 41, 43, 47).

The trial court ruled that since Petitioner was engaged in interstate and foreign commerce, the Territory, without the approval of Congress, had no power to exact from it the fees provided for by the Utility Act (R. 56); and that Congress, upon the approval of Act 135, Session Laws of

Hawaii 1913,<sup>(1)</sup> validated what would otherwise be an unconstitutional burden on interstate and foreign commerce. A judgment for \$53,435.55 (the fees with interest) was entered in favor of the Commission (R. 66).

Petitioner appealed from this judgment to the Supreme Court of Hawaii. That court did not pass upon the ground upon which the trial court rested its decision; it affirmed the ruling that Petitioner was engaged in interstate and foreign commerce.

"The record discloses and it was found by the court below to be a fact that 75% of the defendant's gross annual freight receipts was derived from freight carried by it in commerce with foreign nations and among the several States." (R. 264, 33 Haw. 890, 894)

The Supreme Court of Hawaii also affirmed the finding of the trial court that the Commission had made no inspection and expended nothing in the supervision, inspection, or regulation of Petitioner.

"The trial court at the request of the defendant found, and we think correctly, 'that during the year 1922 to date "no services were ever performed by the public utilities commission in connection with the defendant utility, and that the only time spent by the public utilities commission on the business of this defendant was on three separate occasions of one-half hour each" in which the auditor of the commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed \$30.00 gross' and that 'only such service as indicated was in fact rendered directly

(1) This act placed certain franchise-bearing corporations under the jurisdiction of the Utility Act, see Appendix vi.

as a service which could be characterized as "on behalf of the defendant." " (R. 277, 278)

The Supreme Court of Hawaii reaffirmed its previous ruling that the passage of the Shipping Act, 1916 did not deprive the Commission of the right to collect the fees notwithstanding it had no regulatory powers over Petitioner; held that the burden of proving the fees unreasonable was upon Petitioner and that it failed to sustain that burden; that the court was bound by the legislative determination of the reasonableness of the fees; and that they imposed no unconstitutional burden on interstate and foreign commerce, and were valid under the Fifth and Fourteenth Amendments (R. 281, 33 Haw. 890, 907).

The court below concurred in the findings of the trial court and the Supreme Court of Hawaii to the effect that Petitioner was engaged in interstate and foreign commerce to the extent of 75% of its gross freight receipts (R. 325, 330), and that the Commission had made no inspection or investigation of it during the years in question (R. 325, 326).

The court below then ruled that the Commission had the power of investigating Petitioner's business. It examined the basis of the decision of the trial court to the effect that Congress had approved the Utility Act and held that upon the enactment of the Shipping Act Congress withdrew its approval and took over the field of the regulation of commerce upon the high seas; that although the Shipping Act, 1916 superseded the territorial legislation, nevertheless the Commission retained power of investigation and regulation over commerce strictly local in character.

"Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce" (R. 334).

The court below then examined the question of the validity of an inspection fee measured by the gross receipts from interstate and foreign commerce; held that the burden of proof was upon the Commission to establish the fact that the fees are not disproportionate to the services rendered, and concluded that the Commission "must be deemed to have sustained that burden" (R. 335).

The court below pointed out that the expenditures by the Commission (regulating utilities other than Petitioner) exceeded the total collections made by the Commission from all utilities and that the deficit had to be met by a legislative appropriation (R. 336).

From this the court below concluded that the fees demanded of Petitioner were not unreasonable or disproportionate to the services rendered to other utilities and sustained the exaction notwithstanding the fact that no services were rendered and no expense was incurred by the Commission in connection with this Petitioner.

Although it was presented by the Assignment of Errors<sup>(1)</sup> and urged in the brief, the court below did not pass upon the validity of the fees under the Fifth and Fourteenth Amendments to the Constitution. The judgment of the Supreme Court of Hawaii was affirmed.

(1) R. 293, errors numbered 4, 6, 9, and 10.



### OPINIONS BELOW

The opinions of the courts below are found on the following pages of the record:

Opinion of the trial court (unreported), filed April 12, 1934 (R. 45).

Opinions of the Supreme Court of Hawaii:

First opinion on reserved question, filed October 8, 1931 (R. 12, 32 Haw. 127);

Second opinion of the Supreme Court of Hawaii, filed July 25, 1936 (R. 259, 33 Haw. 890).

Opinion of the Circuit Court of Appeals, filed April 16, 1938 (R. 318-not yet reported).

### JURISDICTION

The opinion of the Circuit Court of Appeals was filed on April 16, 1938. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A. Title 28, Sec. 347).

### QUESTIONS PRESENTED

(1) Did Congress, by the passage of the Shipping Act, 1916 take over the field of regulation of transportation by water between ports in the Territory and thereby oust the Commission of jurisdiction over Petitioner, including the right to collect the fees demanded in this cause?

(2) Do the inspection fees demanded by the Commission in this cause constitute a burden on interstate and foreign commerce in violation of the commerce clause of the Federal Constitution?

(3) Can an inspection fee be levied and collected against Petitioner which fee is measured in part by its gross receipts, a substantial portion of which were derived from interstate and foreign commerce, to defray the expenses of regulating and inspecting other unrelated public utilities operating in the Territory?

(4) Can an inspection fee of approximately \$4,000.00 per annum be sustained as against Petitioner under the Fifth and Fourteenth Amendments to the Federal Constitution where it appears that no investigation, supervision, or regulation of Petitioner was in fact made by the Commission?

(5) Is the burden of proof as to the reasonableness of inspection fees demanded in this case (measured in part by gross receipts derived from interstate and foreign commerce) sustained by the Commission upon the mere showing that its total collections from other unrelated utilities in the Territory over a period of years was less than its total disbursements for the account of such other utilities where it is admitted that it expended nothing for the account of Petitioner over the nine years in question?

#### REASONS FOR ALLOWANCE OF WRIT

This cause involves the question whether or not an inspection fee may be lawfully assessed against this Petitioner, which fee is measured by the gross receipts from its business (local, interstate and foreign) and its capital stock. It is uncontradicted that the Commission is seeking to collect inspection fees when, in fact, it never at any time during the nine years in question made any inspection of

Petitioner's business and never at any time expended any sums on its account, either for regulation, inspection, or supervision.

The Utility Act designates the challenged exaction as an inspection fee. It has been so construed by the Supreme Court of Hawaii and the court below (R. 277, 335).

We contend that it has been settled by this Court that an inspection fee must bear some reasonable relationship to the cost of inspection, and that the fact that the Commission has not expended any sum whatever for a period of nine years in inspecting, supervising, or regulating the Petitioner is conclusive that the fees here challenged are excessive and must fail as in violation of the commerce clause of the Federal Constitution and the due process clauses of the Fifth and Fourteenth Amendments.

We further contend that when Congress enacted the Shipping Act, 1916, vesting complete regulatory power over carriers and other persons engaged in transportation between ports of the Territory in the Shipping Board, this action by the paramount sovereign completely ousted the Commission of jurisdiction over Petitioner, including the right to collect fees provided for by Sec. 2207, Rev. L. Hawaii 1925.

The reasons relied on for granting the writ may be summarized as follows:

(1) The court below in sanctioning the collection of the inspection fees demanded in this cause, notwithstanding the fact that no inspection, supervision, or regulation has been made, has decided an important question of con-

stitutional law contrary to the commerce clause and the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and in conflict with the settled rules of law as declared by this Court.

*Foote & Co. Inc. v. Stanley*, 232 U.S. 494;

*Sprout v. South Bend*, 277 U.S. 163;

*Atlantic & P. Tel. Co. v. Philadelphia*, 190 U.S. 160;

*Western Union Tel. Co. v. New Hope*, 187 U.S. 419;

*Great Northern Railway Co. v. State of Washington*, 300 U.S. 154.

(2) In sustaining the challenged fees, the court below has laid down a rule of law in direct conflict with the decision of this Court in the case of *Great Northern Railway Co. v. State of Washington*, 300 U.S. 154.

In the case last cited this Court had before it a statute<sup>(1)</sup> of the State of Washington substantially identical with the Utility Act here involved and this Court held that where fees were collected by the public utilities department of the State and placed in a revolving fund to be used by the department for the inspection, regulation, and supervision of a number of unrelated utilities engaged both in interstate and local commerce, the burden of proving the reasonableness of the fees demanded was upon the State

(1) This statute (Wash. Sess. L. 1929 Ch. 107) imposed an inspection fee of one-tenth of one per cent on the gross receipts from local commerce; the territorial Utility Act imposes an inspection fee of one-tenth of one per cent on local, interstate, and foreign commerce plus a fee of one-twenty-fifth of one per cent of the capital stock of the utility.

of Washington, and that the State had failed to sustain that burden.

In this cause it is admitted that the Commission over a period of nine years has incurred no expense in the inspection, supervision, or regulation of Petitioner while demanding inspection fees aggregating \$33,724.44 for the same period in which no inspection or regulation was ever made. Hence, under the decision of this Court in *Great Northern Railway v. Washington*, 300 U.S. 154, and also the views expressed in the dissenting opinion in that case, the inspection fees here demanded must fail under the commerce clause, and the due process clauses of the Fifth and Fourteenth Amendments.

(3) The court below has misapplied the decision of this Court in the case of *Bourjois v. Chapman*, 301 U.S. 183, to this cause.

In the case just cited this Court denied the right of Bourjois, Inc. to enjoin a Maine statute imposing a nominal inspection fee upon cosmetics (50 cents per preparation). Suit was filed prior to the effective date of the act, and this Court held the fee not excessive.

The court below has cited *Bourjois v. Chapman* (supra) as authority for its declaration that the Commission in the case at bar must be deemed to have sustained the burden of proof that the fees here demanded are reasonable notwithstanding the undisputed evidence that the Commission has expended nothing in the inspection, supervision, or regulation of Petitioner for the nine years in question.

(4) Whether or not Congress by the enactment of the Shipping Act, 1916 has taken over the field of regulation



and supervision of common carriers by water so as to deprive the states and territories of power over this subject matter, is a question of national importance which should be settled by this Court.

(5) Whether state or territorial public service commissions may inspect common carriers by water—the complete regulation of which is entrusted by Congress to the Shipping Board—and charge such carriers with substantial inspection fees irrespective of the fact that no inspection has been made, is a federal question of great importance which should be settled by this Court.

(6) The court below has declared an erroneous principle of federal law to the effect that where Congress has acted in the field of interstate and foreign commerce by enacting the Shipping Act, 1916 regulating common carriers by water in such commerce, the act of Congress does not divest the states and territories of jurisdiction over the subject matter until such time as the Shipping Board takes affirmative action in the field.

WHEREFORE, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination the full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket No. 8569, Inter-Island Steam Navigation Company, Limited; Appellant, v. Territory of Hawaii by the Public Utilities Commission of the Territory of Hawaii, Appellee; and that the judgment

of said court be reversed by this Court, and for such further relief as to this Court may seem proper.

DATED: Honolulu, Hawaii, May 27, 1938.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,

By J. GARNER ANTHONY,

*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY

*Of Counsel.* //

# In the Supreme Court of the United States

OCTOBER 1937 TERM

No. ....

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,

*Petitioner,*

vs.

TERRITORY OF HAWAII by Public  
Utilities Commission of the Ter-  
ritory of Hawaii,

*Respondent.*

## Brief in Support of Petition for Writ of Certiorari

The petition contains a statement of the grounds of jurisdiction, a statement of the case, and references to the opinions of the court below.

### ERRORS TO BE URGED

The Circuit Court of Appeals erred in:

(1) Holding that the Commission had sustained the burden of proof as to the reasonableness of the challenged fees when in fact it is conceded that no inspection, super-

vision, or regulation of Petitioner has been made during the period in question and the Commission has incurred no expense whatever on account of Petitioner in any inspection, supervision, or regulation;

(2) Failing to hold that the inspection fees demanded in this cause are void under the Fifth and Fourteenth Amendments to the Federal Constitution where it appears that no inspection, supervision, or regulation has ever been made by the Commission during the nine years in question;

(3) Holding that the Utility Act applies to Petitioner;

(4) Holding that the enactment of the Shipping Act, 1916 by Congress did not deprive the Commission of jurisdiction over Petitioner, including the right to collect fees prescribed in the Utility Act;

(5) Holding that the fees prescribed in the Utility Act did not constitute a burden on interstate and foreign commerce, imports and exports, in violation of the Federal Constitution.

## ARGUMENT

### I.

**THE INSPECTION FEES DEMANDED ADMITTEDLY BEAR NO RELATION TO THE COST OF INSPECTION OR REGULATION AND, THEREFORE, IMPOSE UNCONSTITUTIONAL BURDENS ON INTERSTATE AND FOREIGN COMMERCE, AND ARE VOID UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.**

The finding of the court below affirming the findings of the trial court and the Supreme Court of Hawaii settles the fact that 75% of Petitioner's annual gross freight

receipts were derived from the carriage of goods in interstate and foreign commerce. This business amounted to more than three-quarters of a million dollars annually (R. 74).

It is conceded that the Commission has at no time during the period in question made any inspection, regulation, or supervision of Petitioner's business, and incurred no expense for the account of Petitioner. Under these circumstances we contend that the inspection fees amounting to more than \$4,000.00 per annum levied against Petitioner's business indiscriminately (local, interstate, and foreign) are void as a direct burden on interstate and foreign commerce and deny to Petitioner due process of law.

- (1) The Territory cannot burden interstate and foreign commerce.

Under the commerce clause of the Federal Constitution, Congress is given the power to regulate interstate and foreign commerce and no state may burden such commerce, no matter what form the exaction takes (*Minnesota v. Blasius*, 290 U.S. 1), and this whether a foreign or domestic corporation is involved (*Philadelphia & S. Mail S.S. Co. v. Pennsylvania*, 122 U.S. 326; *Gloucester Ferry Company v. Pennsylvania*, 114 U.S. 196).

The limitations upon a territory with respect to burdening interstate and foreign commerce are the same as those imposed upon states with respect to such commerce. This was recognized by the court below:

"\* \* \* we think, as a practical matter, a territory must be considered in the same category as a state, and that the commerce clause is applicable to such territory. \* \* \* If that point was not expressly so



decided in *McLean v. Denver & Rio Grande R. R. Co.*, 203 U.S. 38, and *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, it was so implied." (R. 328)

- (2) The justification for all inspection fees must rest in the police power.

Whenever a state or a territory purports to exercise its police power to exact inspection fees from a carrier engaged in interstate and foreign commerce to defray the expense incurred, two problems are presented: first, whether the federal statutes on the same matter exclude state regulation; and, second, do the fees burden interstate and foreign commerce. *Simpson v. Shepard*, 230 U.S. 352, 397. Any state or territorial legislation affecting interstate commerce must meet this double test. If a state statute does burden interstate commerce, then whether it is in conflict with a federal statute or not need not be considered. *Lemke v. Farmer's Grain*, 258 U.S. 50. Likewise a determination that a state statute does not burden interstate commerce leaves open the question whether the statute is in conflict with applicable federal legislation. *Savage v. Jones*, 225 U.S. 501. Conversely, a decision that the act does not conflict with a federal statute leaves open the question whether or not the fees imposed in fact burden interstate and foreign commerce.

We contend, first, that the exaction of the fees under the Utility Act imposes an unconstitutional burden on interstate and foreign commerce and cannot be justified under the police power; and, second, assuming that reasonable fees representing the cost of investigation may be collected from a carrier engaged in interstate and foreign com-

merce, the fees here demanded are so unreasonable and admittedly bear no relation to the services rendered, that they are therefore void.

Assuming for the purposes of this discussion that the Shipping Act, 1916, does not prevent collection of these fees and that some fees may be collected from a corporation engaged in interstate and foreign commerce, we turn at once to the question whether or not the fees can be considered as proportionate to the cost and expenses of the alleged investigation.

The second clause of Section 10, Article I, of the United States Constitution, provides:

"\* \* \* No State shall, without the Consent of the Congress, lay an Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws \* \* \*"

The Constitution does not expressly grant to the states the power to levy inspection fees on goods in interstate commerce; nevertheless the principle embodied in the foregoing clause of the Constitution has been extended to such commerce. *Patapsco Guano Co. v. Board of Agriculture*, 171 U.S. 345; *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154. All attempts by a state to exact fees for their police measures rest upon the same basis as the power to levy inspection fees. *Sprout v. South Bend*, 277 U.S. 163. Hence, all inspection fees of whatever kind or description must not exceed the reasonable cost of inspection.

*Foot & Co. v. Stanley*, 232 U.S. 494;  
*A. & P. Tel. Co. v. Phila.*, 190 U.S. 160;  
*Western Union v. New Hope*, 187 U.S. 419;  
*Postal Tel. Cable Co. v. Taylor*, 192 U.S. 64.

We shall next consider on whom rests the burden of proving these fees reasonable.

- (3) Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities generally, the burden of proof is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection.

The Utility Act by definition applies to a large assortment of unrelated utilities, gas, electric, telephone, telegraph, and street railroad companies, wharfingers, warehousemen, and carriers by water. All are made liable for the fees irrespective of the character of their business, whether local, foreign, or interstate. The funds collected by the Commission are used for the most part in the regulation of utilities which are not subject to federal regulation (Exhibit A, R. 69). This presents the identical<sup>(1)</sup> situation before this Court in *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154. This Court held that under such circumstances the burden of proof was upon the state to establish the reasonableness of the fees as to the Great Northern Railway.

The Supreme Court of Hawaii held that the burden of proof was on Petitioner and that it had failed to sustain the burden.

---

(1) The fees levied by the Utility Act differ from those imposed by the Washington statute (1929 Wash. Sess. L. Ch. 107) in that the former impinge indiscriminately on local, interstate, and foreign business while the latter were confined to local business; hence, the Utility Act as construed by the court below is open to the charge that as to this Petitioner the act is void on its face.

That court held the test of reasonableness was not the cost or expense to which the Commission was put in regulating and inspecting Petitioner, but what would have been a reasonable expense had the Commission made any inspection.

"It does not appear from the Act itself, and the record is silent on the subject, that the amounts sought to be collected from the defendant for the years in question would exceed that necessary to meet the expense of its investigation had the commission found it necessary to perform this duty." (R. 281)

The decision of the Supreme Court of Hawaii was rendered on July 25, 1936, and that court did not have before it the decision of this Court in *Great Northern Ry. Co. v. State of Washington* (supra), which case was decided February 1, 1937.

The court below, however, reversed the ruling of the Supreme Court of Hawaii on the question of the burden of proof, but concluded (despite the fact there was no evidence to support the conclusion) that:

"We believe Appellee (the Commission) 'must be deemed to have sustained that burden' as stated in *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187." (R. 335)

In other words, in face of an inspection fee levied against a number of unrelated public utilities and deposited in a common fund for the regulation of all, and in face of the undisputed evidence that the Commission in this cause has never expended any sum in the inspection, supervision, or regulation of Petitioner during the entire period (nine years) under consideration, the court below

has held that the Commission has sustained the burden of proof that the fees here demanded are reasonable.

- (4) The uncontradicted evidence is that the Commission has expended nothing for nine years in regulating or inspecting Petitioner; this fact is conclusive that inspection fees of \$4,000.00 per annum are excessive.

If a state or a public utility commission may be said to have sustained the burden of proof in a case where it has put on literally no evidence as to the cost of inspection and admits that no inspection or supervision has ever been made by it, then the holding of this Court in *Great Northern Ry. Co. v. State of Washington* (supra) is in truth overruled by the decision of the court below in this cause.

The authority for the statement by the court below that the Commission has sustained the burden of proof is *Bourjois, Inc. v. Chapman* (supra). In that case only a nominal fee was involved and an injunction was sought prior to the effective date of the act. In other words, at the time the statute was questioned in that case no expenses in investigation had been incurred since the act was not yet in operation. To apply such a case to the facts presented in this cause appears to us absurd, for, in the case here under consideration, this Commission has not lifted a finger in the regulation, supervision, or inspection of Petitioner for nine years, and at the same time says that \$4,000.00 a year is a reasonable inspection fee.

The court below misunderstood the holding of this Court in *Great Northern Ry. Co. v. State of Washington*, for it examines the record and comes to the conclusion that, since the total receipts of the Commission under the Utility Act were less than its total disbursements,



therefore the fees assessed against Petitioner are reasonable. This is the very thing which this Court has said is not the law. Where fees are collected and deposited in a common fund for the regulation of a number of public utilities, it must appear that the fees collected from the particular public utility in question are reasonable. The issue involved is not whether the Commission has from all sources obtained a reasonable sum for the performance of its general duties in connection with all other utilities, but rather has the Commission collected a reasonable fee against a particular utility, which fee represents the reasonable expenses incurred in the investigation and regulation of that utility?

That the court below misunderstood the nature of inspection fees and the decision of this Court in *Great Northern Ry. Co. v. State of Washington* (supra) is apparent from the following statement:

"There is here no charge that the exaction is to be used for a purpose other than the legitimate one of supervision and regulation." (R. 335)

From this the court's idea of a reasonable inspection fee is not to defray any expense which has been incurred in inspection, but a holding that, if the fee is in the future to be used for the purpose of supervision and regulation, then it is valid. If this were the criterion, then no inspection fee could ever be challenged as excessive for the reason that the inspecting agency could always assert that, although it had incurred no expense to date in inspection and regulation, it contemplated that some time in the indefinite future, expenses in inspection would be incurred, and that the sums collected from the utility would

in the future be used for the purpose of regulating it. Under the view of the court below no force is attributed to the palpable fact that in this cause the Commission has expended nothing on Petitioner for more than nine years.

The Commission's long history of non-supervision and non-regulation of Petitioner reflects the fact that regulatory jurisdiction has been turned over to federal agencies. To square with constitutional principles the Legislature of Hawaii should have reduced the fees to be collected from Petitioner to a sum comparable to the amount expended by the Commission on its behalf. The failure to do this renders the whole charge void.

*Foot v. Stanley*, 232 U.S. 494;

*Great Northern Ry. Co. v. State of Washington*,  
300 U.S. 154.

- (5) The fees sought to be collected are so excessive as to amount to a taking of Petitioner's property without due process of law in violation of the Fifth and Fourteenth Amendments.

We contend that the fees here demanded are void under the Fifth and Fourteenth Amendments to the Federal Constitution. We recognize that there may be doubt as to whether the Fourteenth Amendment, which, strictly speaking, is a restraint upon states, has any application in a territory. Nevertheless, the guarantees afforded to persons and corporations of the states under the Fourteenth Amendment are afforded to persons and corporations in the territories under the Fifth Amendment.

*Farrington v. Tokushige*, 273 U.S. 284, 299.

Petitioner is subject to complete federal control by the Shipping Board under the Shipping Act, 1916 (Infra p.

29). Evidence was tendered and rejected which would have shown the minute detail of federal regulation (R. 213-215). The Commission concedes that it has no power of regulation over Petitioner or to compel Petitioner to act in any matters covered by the Shipping Act, 1916 and related federal legislation.

We concede that where a particular class must be inspected or investigated by the state it is proper to make the members of the class bear the burden of the cost of investigation. Superficially, the Utility Act would seem to treat all utilities alike by compelling them to contribute to a common fund used for the investigation of utilities generally. It is clear that a statute valid on its face may be invalid in its application.

The evidence in this cause is undisputed that the fees sought to be collected have no relation to expenditures on Petitioner's account. In substance, the exaction of fees amounting to \$4,000.00 annually is made not for the purpose of investigating Petitioner, but for the purpose of investigating other utilities over which the Commission has regulatory jurisdiction. Hence, apart from the fact that these fees burden interstate and foreign commerce, we contend they are so excessive as to deny Petitioner due process of law.

What we have already said as to the unreasonableness of the fees as a burden on interstate and foreign commerce (supra, pp. 23-27) applies equally to this contention that the fees are excessive under the Fifth and Fourteenth Amendments. It is to be remembered that the Legislature is not exercising the taxing power in levying the fees here challenged, but is exercising its police power for the pur-

pose of defraying the cost of investigation and inspection. Measured by any yardstick, the fees here in question, exceeding \$4,000.00 per annum, exacted for doing nothing in a subject matter in which Congress has already acted and deposited regulatory power in federal agencies, cannot be justified under the Fifth Amendment.

*Sprout v. South Bend*, 277 U.S. 163.

## II.

**UNDER THE PROPER CONSTRUCTION OF THE SHIPPING ACT, 1916 AND THE UTILITY ACT, THE COMMISSION HAS NO JURISDICTION OVER THE PETITIONER AND CANNOT COLLECT THE FEES DEMANDED.**

Apart from the matters discussed under Point I in this brief, we contend that as a matter of statutory construction of the Utility Act and the Shipping Act, 1916 these fees cannot be collected.

Upon the enactment of the Shipping Act, 1916 Congress took over the field of regulating transportation on the high seas within the Territory and Petitioner was placed under the jurisdiction of the Shipping Board (*Re: I. I. S. N. Co.*, 24 Haw. 136). As this Court has said the Shipping Act, 1916 "closely parallels the Interstate Commerce Act; and \* \* \* Congress intended that the two Acts, each in its own field, should have like interpretation, application, and effect." *U. S. Nav. Co. v. Cunard S. S. Co.*, 284, U.S. 474, 481.

The exclusive effect of Congressional action in the field of interstate commerce has been settled by this Court (*Chicago R. I. & P. R. Co. v. Hardwick Farmers Elev. Co.*, 226 U.S. 426; *Penn. Railroad v. Public Service Com-*

mission, 250 U.S. 566), and the court below correctly held that the same rule applied to this cause:

"The exclusive effect of Congressional action is quite clear. Thus in the case last cited, it is said that 'there can be no divided authority over interstate commerce.' The states may not 'complement' the act of Congress, or prescribe 'additional regulations' or 'auxiliary provisions for the same purpose' (*Prigg v. Pennsylvania*, 41 U.S. [16 Pet.] 536, 617; *New York Central R. R. Co. v. Winfield*, 244 U.S. 147, 153), nor 'supplement' such act." (R. 331)

However, the court below then distinguished between intrastate commerce and interstate commerce, holding that as to the former (commerce between ports of the Territory) the Shipping Act, 1916 did not supersede the Utility Act for the reason that there was no evidence to show that the Shipping Board had actually performed the duties devolving upon it under the terms of the act.

"Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce." (R. 334)

This ruling is in direct conflict with the decision of this Court in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 613:

"The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power."



The exclusive effect of Congressional action in this field cannot be made dependent upon the activity or non-activity of the employees of the federal agency designated by Congress to perform the duties prescribed in the act. If this were so, then a failure on the part of the personnel of any federal agency to perform its statutory duties would be sufficient to justify the states or territories in proceeding with regulation in the face of a Congressional statute on the subject. Carried to its logical extreme, it would mean that, so long as active regulation was conducted by the federal agency, state or territorial power would be superseded, but whenever the federal agency ceased to act, state or territorial power at once would be called into being.

Furthermore, the court below completely overlooked the fact that the Shipping Act, 1916 placed in the Shipping Board jurisdiction over all transportation by water on the high seas between ports of the Territory. This Congress could do in the exercise of its plenary power over territories. Therefore, regardless of the nature of the commerce, whether intrastate or interstate, there was nothing left within the jurisdiction of the local Commission; Congress had completely taken over the field.

We will not encumber this brief with any full discussion of the basis upon which the trial court rendered its decision in this cause. In brief, the trial court found that the challenged fees burdened interstate and foreign commerce, were invalid in the absence of Congressional approval, that Congress had approved the Utility Act, thereby validating what would otherwise be unconstitutional burdens on interstate and foreign commerce. The basis of the trial court decision was so obviously unsound

that it was ignored by the Supreme Court of Hawaii. The Court of Appeals, however, referred to it and rejected the conclusion of the trial court.

The court below, in the course of its opinion, says:

"Appellee contends that Congress expressly ratified the act creating the commission by its Act of March 28, 1916. Appellant seems not to differ with that view, and we may here assume that Congress did consent to regulation of interstate and foreign commerce within the Territory by appellee. But it is obvious that some five months later Congress withdrew its consent to regulation of such commerce, \* \* \* by enactment of the Shipping Act." (R. 330)

Were it not for the remark that we seemed "not to differ with that view" we would not discuss this phase of the case at all. We are at a loss to discover how the court below assumed that we did not differ from the contention that Congress had approved the regulation of interstate and foreign commerce by the Commission; the contrary view was fully presented both in the briefs and argument. Lest we be deemed to acquiesce in this remark of the court below we will briefly summarize our contentions on this point.

At the outset it should be borne in mind that the Utility Act was never submitted to Congress for its approval. Section 55 of the Hawaiian Organic Act (39 Stat. 443) provides that "no special or exclusive" franchises may be granted by the Territory without Congressional approval. A number of utilities (other than Petitioner) doing business in the Territory held franchises approved by Congress, and with the enactment of the Utility Act in 1913 it

was thought advisable to make those franchises specifically subject to the Utility Act; hence, Act 135 of the Session Laws of Hawaii 1913 was passed (Appendix vi). The purpose of this act was to make sure that public utilities holding franchises would be subject to the provisions of the Utility Act (Opinion, Supreme Court of Hawaii, R. 17). It had nothing to do with the obtaining of Congressional approval to the exaction of the fees prescribed by the Utility Act.

—Act 135, Session Laws of 1913, was entitled:

“An Act

Relating to Certain Gas, Electric Light and Power,  
Telephone, Railroad and Street Railway Companies  
and Franchises in the Territory of Hawaii and  
Amending the Laws Relating Thereto.”

The body of Act 135 provided that certain franchises which had been granted by the Legislature of Hawaii and approved by Congress and “the persons and corporations holding said franchises shall \* \* \* be subject to the provisions of Act 89 (the Utility Act).” This Act 135 did not apply to Petitioner for the reason that it never held a franchise from the Territory. Act 135 was approved and amended by Congress on March 28, 1916 (39 Stat. 38, c. 53, Appendix viii), by an Act entitled:

“An Act

To ratify, approve, and confirm an act duly enacted  
by the Legislature of the Territory of Hawaii relat-  
ing to certain gas, electric light and power, telephone,  
railroad, and street railway companies and franchises  
in the Territory of Hawaii, and amending the laws  
relating thereto.”

Congress adding to the territorial act the following language:

“\* \* \* all franchises heretofore granted to any other public utility or public utility company and all public utilities and public utilities companies organized or operating within the Territory of Hawaii \* \* \*.”

When Act 135 was approved by Congress Petitioner was not included by the language inserted by Congress under the fundamental rule of *noscitur a sociis*. Congress probably intended to make sure that all franchise-bearing corporations were made subject to the provisions of the Utility Act. This was the view taken by the Supreme Court of Hawaii (*In Re: I. I. S. N. Co.*, 24 Haw. 136, 145), and this construction is further borne out by the fact that the title to the act remained unchanged.

Assuming that Petitioner does fall within the language inserted by the act of Congress, it by no means follows that the act of Congress has the effect of giving Congressional assent to the burdening of interstate and foreign commerce by the collection of the fees here in question.

The short answer to the reasoning of the trial court is that no act of Congress can be pointed to whereby Congress has approved the burdening of interstate and foreign commerce by the Territory. In fact in the Utility Act the Territory expressly disclaimed any intention to interfere with interstate or foreign commerce:

“This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States \* \* \*.”

(Rev. La. Hawaii 1925 Section 2210)

The trial court ruled that when Congress approved Act 135 (which Act subjected certain franchise-bearing utilities to the Utility Act), it indirectly approved the Utility Act, and that, since Congress in this roundabout manner "approved" the Utility Act, which Act itself provided that it should not apply to interstate or foreign commerce, then the very "approval" of the Utility Act *ipso facto* changed the Utility Act to make it specifically applicable to interstate and foreign commerce.

To put it another way, in the view of the trial court, Congress approved a territorial statute, which statute expressly states that it does not apply to interstate and foreign commerce; hence, the act of Congress in approving the territorial statute had the effect of changing it so that it forthwith applied to interstate and foreign commerce. Undoubtedly, because of this specious reasoning the Supreme Court of Hawaii ignored the basis of the trial court's decision.

As we have said before (*supra*, p. 32), the Court of Appeals noticed and rejected the conclusion of the trial court, the Court of Appeals ruling that, even assuming that Congress had approved the Utility Act, with the enactment of the Shipping Act it thereby withdrew its approval.

Either of the reasons stated above is a sufficient answer to the trial court's curious conclusion that Congress had approved the levying of what would otherwise be unconstitutional burdens on interstate and foreign commerce by the Territory of Hawaii.



## CONCLUSION

This cause involves the right of the territorial public utilities commission to exact inspection fees from Petitioner, a steamship company under complete regulation by federal agencies. The undisputed evidence shows that Petitioner, during the years in question, did a substantial business in the carriage of goods in interstate and foreign commerce, and that during this period the Commission has expended nothing in the regulation or inspection of Petitioner.

The Court of Appeals, in face of an authoritative decision by this Court to the contrary (*Great Northern Ry. Co. v. State of Washington*), has declared that fees in the sum of \$4,000.00 per annum are reasonable inspection fees notwithstanding the fact that the record discloses, and the Commission concedes, that no inspection was made and no expense was incurred by it on Petitioner's account. The holding of the Court of Appeals is a result of a misunderstanding of the nature of inspection fees and the basis of their justification, and the result of a misapplication of the decisions of this Court. It should not be permitted to stand.

The Court of Appeals has also laid down a palpably erroneous rule on the interpretation of the delegation of legislative power to the effect that, until the agents of the Shipping Board exercise their powers, the Shipping Act, 1916 does not have the effect of superseding territorial legislation. This again is in direct conflict with the decisions of this Court.

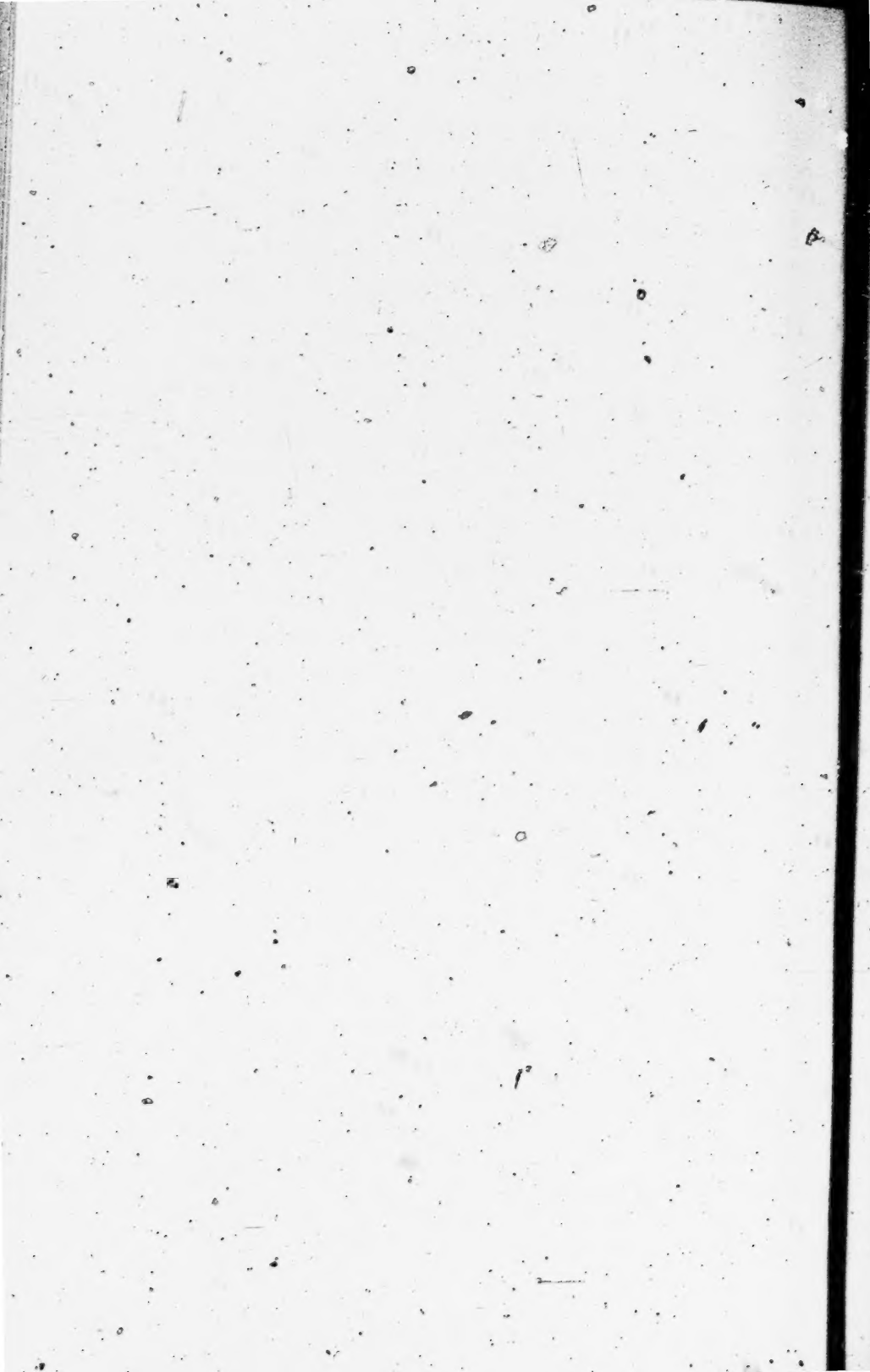
We submit that the judgment below should be reversed  
and that the complaint should be dismissed.

DATED: Honolulu, Hawaii, May 27, 1938.

Respectfully submitted,

J. GARNER ANTHONY,  
*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY,  
*Of Counsel.*



L  
**APPENDIX**





## APPENDIX

For convenient reference, here follows a digest of the applicable territorial and federal statutes, the pertinent portions of which are quoted verbatim and are so indicated by quotation marks:

### *Ch. 132, Revised Laws of Hawaii 1925:*

This statute was originally Act 89 of the Session Laws of 1913, as amended by Act 127 of the Session Laws of 1913; and took effect on July 1, 1913; the reference to sections are to Revised Laws of Hawaii 1925.

Sec. 2189 provides for the number and appointment of commissions.

Sec. 2190 empowers the Commission to appoint attorneys, engineers, accountants, and other assistants.

Sec. 2191 provides for an annual report by the Commission to the Governor.

Sec. 2192 gives the Commission general supervision over all public utilities in the Territory.

Sec. 2193 provides:

"The commission and each commissioner shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount

and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum."

Sec. 2194 obliges all public utilities, upon request, to permit examination of the books and furnish required information.

Sec. 2195 requires each utility to report accidents to the Commission.

Sec. 2196 empowers the Commission to take testimony, compel the attendance of witnesses, and the production of evidence.

Sec. 2197 requires each utility to publish its rates, charges and rules in the manner required by the Commission.

Sec. 2198 provides for notices to utilities of hearings on proceedings and complaints.

Sec. 2199 permits a utility to appear by counsel and examine any witnesses called.

Sec. 2200 empowers the Commission to make rules respecting procedure.

Sec. 2201 empowers the Commission, if it be of the opinion that any utility is violating any territorial or federal law or failing to make changes or additions in its service, to investigate the matter and institute proceedings before the Interstate Commerce Commission, or in any other court or body.

Sec. 2202 provides:

"All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its own motion, or upon complaint, and in so far as it is not prevented by the Constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the

order appealed from should be sustained in whole or in part."

Sec. 2203 empowers the Commission to investigate rates made by persons holding water leases from the Territory of Hawaii.

Sec. 2204 provides the procedure by the Commission to secure to consumers reasonable rates for water and to cancel water leases and licenses charging unreasonable rates.

Sec. 2205 provides a penalty of one thousand dollars for every violation of any order of the Commission or of any provision of this chapter.

Sec. 2206 provides that any person testifying falsely before the Commission shall be guilty of perjury.

Sec. 2207 provides:

"All salaries, wages and expenses, including traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation

by the commission a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

Sec. 2208 provides:

"The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Sec. 2209 provides:

"If any section, sub-section, sentence, clause or phrase of this chapter shall for any reason be held



to be invalid as to any or all matters within its terms, such decision shall not affect the validity of the remaining portions of this chapter, or the validity of such portion as to any other matter within its terms."

Sec. 2210 provides:

"This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

*Act 135, Session Laws of 1913, provides:*

#### "AN ACT

"Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto.

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The franchises granted by Act 30 of the Laws of 1903 of the Territory of Hawaii, as amended and approved by an Act of Congress approved April 21, 1904, Act 48 of the Laws of 1903 of said Territory, as amended and approved by an Act of Congress approved April 21, 1904, Act 66 of the Laws of 1905 of said Territory, as amended and approved by an Act of Congress approved June 20, 1906, Act 105 of the Laws of 1907 of said Territory, as amended and approved by an Act of Congress approved February 6, 1909, Act 130 of the Laws of 1907 of said Territory, as

amended and approved by said Act of Congress, approved February 6, 1909, Act 115 of the Laws of 1909 of said Territory, as amended and approved by an Act of Congress approved June 25, 1910, and Act 66 of the Laws of 1911 of said Territory, as amended and approved by an Act of Congress approved August 1, 1912, and the persons and corporations holding said franchises, shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of Act 89 of the Laws of 1913 of said Territory creating a public utility commission and all amendments thereof for the regulation of public utilities in said Territory, and all the powers and duties expressly conferred upon or required of the Superintendent of Public Works or the courts by said acts granting said franchises are hereby conferred upon and required of said public utility commission and any commission of similar character that may hereafter be created by the laws of said Territory, and said acts granting said franchises are hereby amended to conform herewith.

"Section 2. This Act shall take effect upon its approval by the Congress of the United States.

"Approved this 29th day of April, A. D. 1913.

"WALTER F. FREAR, . . .

"Governor of the Territory of Hawaii."

*Act of Congress of March 28, 1916* (39 Stat. at L. 38, c. 53), provides:

"An Act to ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of the Territory of Hawaii, entitled 'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto,' approved by the governor of the Territory April twenty-ninth, nineteen hundred and thirteen, be, and is hereby, amended, ratified, approved, and confirmed, as follows:

#### 'ACT 135

'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

'Be it enacted by the Legislature of the Territory of Hawaii:

'SECTION 1. The franchises granted by act thirty of the laws of nineteen hundred and three, of the Territory of Hawaii, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act forty-eight of the laws of nineteen hundred and three of said Territory, as amended and approved by an

Act of Congress approved April twenty-first, nineteen hundred and four; act sixty-six of the laws of nineteen hundred and five of said Territory, as amended and approved by an Act of Congress approved June twentieth, nineteen hundred and six; act one hundred and five of the laws of nineteen hundred and seven of said Territory, as amended and approved by an Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and thirty of the laws of nineteen hundred and seven of said Territory, as amended and approved by said Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and fifteen of the laws of nineteen hundred and nine of said Territory, as amended and approved by an Act of Congress approved June twenty-fifth, nineteen hundred and ten; act sixty-six of the laws of nineteen hundred and eleven of said Territory, as amended and approved by an Act of Congress approved August first, nineteen hundred and twelve; and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said

public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith; *Provided, however,* That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce: *And provided further,* That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory.

'Section 2. This act shall take effect upon its approval by the Congress of the United States.

'Approved this twenty-ninth day of April, anno Domini nineteen hundred and thirteen.

'WALTER F. FREAR,  
'Governor of the Territory of Hawaii.'

'Approved, March 28, 1916.' "



*Shipping Act, 1916* (U.S.C.A., Title 46, Sec. 801, et seq., 39 Stat. at L. c. 451, p. 728), the references below to sections are to United States Code Annotated:

Sec. 801 provides:

"The term 'common carrier by water in foreign commerce' means a common carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: PROVIDED, That a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce.'

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession. \* \* \*"

Sec. 804 provides for the creation of the United States Shipping Board and the appointment of a board of seven commissioners.

Sec. 805 fixes the salaries of the members of the board, authorizes the board to employ and fix the compensation of attorneys, officers, naval architects, special experts, examiners, clerks, and other employees.

Sec. 806 provides for the transfer of vessels belonging to the War or Navy Department to the board.

Sec. 811 authorizes the board to investigate the relative cost of building merchant vessels in the United States and in foreign countries, and report its findings to Congress.

Sec. 812 prohibits common carriers by water to enter into any understanding or agreement to pay or allow deferred rebates to any shipper, or to discriminate against any shipper.

Sec. 813 provides for hearings before the board, either on its own motion or upon complaints after notice, on the question whether or not any carrier has violated any provision of Sec. 812, or entered into any agreement with anyone for deferred rebates or other unfair practices.

Sec. 814 provides that every common carrier shall file with the board all written contracts with any other person subject to the chapter, relating to the fixing or regulating of rates or fares, or controlling competition. The board is authorized to cancel or modify any contract in the event it finds the same discriminatory or unfair between carriers, shippers, exporters, importers, or if it operates to the detriment of the commerce of the United States. Violation of this section carries a penalty of one thousand dollars a day and is recoverable in civil actions.

Sec. 815 prohibits carriers from giving any unreasonable preference to any person or of any particular traffic and prohibits the allowance to any person of transportation at less than established rates by means of false billing or any unfair device.

Sec. 816 prohibits discrimination between shippers of the United States and foreign competitors and provides that the board, after hearing, may enter a desist order.

Sec. 817 provides:

"Every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

"Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such

carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Sec. 818 prohibits the reduction of rates for the purpose of injuring a competitive carrier.

Sec. 819 prohibits a carrier from disclosing information to any person other than the shipper or consignee of the nature, kind, destination and routing of any freight.

Sec. 820 provides for the filing of periodic reports by carriers.

Sec. 821 provides that any person may file a sworn complaint with the board, and empowers the board to direct the payment of reparation.

Sec. 822 provides that orders of the board relating to any violation of the chapter shall be made after full hearing and upon a sworn complaint or any proceedings instituted of its own motion.

Sec. 823 requires the board to make written record of every investigation and hearing and its proceedings.

Sec. 824 empowers the board to reverse or modify any order upon application after notice.

Sec. 825 empowers the board to investigate privileges afforded and burdens imposed upon vessels of the United States in foreign trade and report to the President of the United States.

Sec. 826 empowers the board to investigate alleged violations of this chapter, subpoena witnesses, compel the production of books, documents and other evidence, and compel testimony under oath.

Sec. 827 provides that no one shall be excused from testifying on the ground of self-incrimination, but grants immunity from criminal prosecution to natural persons so testifying.

Sec. 828 provides for the enforcement of any order of the board other than for the payment of money.

Sec. 829 provides for the enforcement of any order of the board for the payment of money in the District of the United States having jurisdiction, and that the findings and order of the board shall be prima facie evidence of the facts therein stated.

Sec. 830 provides that the venue and procedure in the courts of the United States in suits brought to enforce or revoke any order of the board shall be the same as in similar suits relating to the orders of the interstate commerce commission.

Sec. 831. The violation of this chapter is a misdemeanor punishable by fine not to exceed five thousand dollars.

Sec. 832. This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission.

Sec. 833 provides a separability clause in the event any one section of this chapter is held unconstitutional.

Sec. 834 empowers the Secretary of the Treasury to refuse clearance to a vessel where he finds such vessel declines to receive freight and has accommodation for the same.

Sec. 835 makes it unlawful to transfer any vessel owned by a citizen of the United States to a foreign registry.



Sec. 836 provides for proceedings upon forfeitures.

Sec. 837 provides in any forfeiture proceeding the conviction in any court of criminal jurisdiction shall be prima facie evidence in such proceedings.

Sec. 838 provides for the filing with the board of any mortgage or other transfer of any vessel.

Sec. 839 provides for the approval by the board of any act or transaction requiring such approval under this chapter.

Sec. 840 provides that any vessel registered, enrolled or licensed under the laws of the United States shall be a documented vessel within the meaning of Sec. 835.

Sec. 841 provides for the proclamation of the President that a war or emergency has ended.

Sec. 842 provides that the Act of September 7, 1916, c. 451, may be cited as "Shipping Act, 1916."

INT

TER

ROBE  
Ho

FILE COPY

Office - Supreme Court, U. S.  
FILED

OCT 31 1938

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER 1938 TERM

\_\_\_\_\_  
No. 94  
\_\_\_\_\_

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
*Petitioner,*

v.

TERRITORY OF HAWAII by Public Utilities Commission  
of the Territory of Hawaii, *Respondent.*

\_\_\_\_\_  
**BRIEF ON BEHALF OF INTER-ISLAND STEAM  
NAVIGATION COMPANY, LIMITED.**  
\_\_\_\_\_

GARNER ANTHONY,  
*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY,  
Honolulu, Hawaii.  
*Of Counsel.*



## SUBJECT INDEX.

Table of Authorities.	Page
Chronology.	
Opinions Below .....	2
Jurisdiction .....	2
Statement of the Case .....	3
Errors to be Urged .....	12
Summary of Argument .....	13
Argument .....	15
<b>I. The Inspection Fees Demanded Admittedly Bear            No Relation to the Cost of Inspection or Regula-            tion and, Therefore, Impose Unconstitutional            Burdens on Interstate and Foreign Commerce,            and Are Void Under the Fifth and Fourteenth            Amendments .....</b>	
(1) The Territory cannot burden interstate and foreign commerce .....	16
(2) The challenged fees are levied upon peti- tioner's interstate foreign and local busi- ness indiscriminately; this is an improper subject matter, hence the fees are invalid.	17
(3) The justification for all inspection fees must rest in the police power.....	18
(4) The fees demanded bear no reasonable re- lation to the cost of inspection and super- vision, and since they are exacted from Petitioner, which does both interstate and local commerce, they must necessarily fail under the commerce clause .....	20
(5) Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities	

	Page
generally, the burden of proof is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection .....	26
(6) The uncontradicted evidence is that the Commission has expended nothing for nine years in regulating or inspecting Petitioner; this fact is conclusive that inspection fees of \$4,000.00 per annum are excessive .....	28
(7) The fees sought to be collected are so excessive as to amount to a taking of Petitioner's property without due process of law in violation of the Fifth and Fourteenth Amendments .....	30
II. Under the Proper Construction of the Shipping Act, 1916 and the Utility Act, the Commission Has No Jurisdiction Over the Petitioner and Cannot Collect the Fees Demanded .....	32
III. Counsel's Attempt to Justify the Erroneous Judgment Below Upon a Ground Ignored by the Supreme Court of Hawaii and Rejected by the Circuit Court of Appeals is Without Merit.....	34
Conclusion .....	35
Appendix .....	41

#### TABLE OF CASES.

A. & P. Tel. Co. v. Phila., 190 U. S. 160 .....	20
Allen v. Pullman's Palace Car Co., 191 U. S. 171 .....	18
Atchison, Topeka Ry. v. Harold, 241 U. S. 371 .....	21
Bourjois Inc. v. Chapman, 301 U. S. 183, 187 .....	27, 28
Carson Petroleum Co. v. Vial, 279 U. S. 94 .....	15, 21
Chicago R. I. & P. R. Co. v. Hardwick Farmers Elev. Co., 226 U. S. 426 .....	32



# Index Continued.

iii

	Page
Farrington v. Tokushige, 273 U. S. 299.....	30
Foote & Co., Inc. v. Stanley, 232 U. S. 494.....	20, 30
Galveston Ry. Co. v. Texas, 210 U. S. 217.....	15, 21
Gloucester Ferry Co. v. Penna., 114 U. S. 196.....	16
Great Northern Railway Co. v. State of Washington, 300 U. S. 154 .....	20, 26, 27, 28, 29, 30, 39
Hanley v. Kansas City Ry., 187 U. S. 617.....	16
Ingels v. Morph, 300 U. S. 290.....	21
Re I. I. S. N. Co., 24 Haw. 136.....	6, 24, 32, 37
Interstate Transit Inc. v. Lindsey, 283 U. S. 183.....	21
Kelley v. Washington, 302 U. S. 1, 4.....	6
Leloup v. Port of Mobile, 127 U. S. 640.....	17
Lemke v. Farmers' Grain, 258 U. S. 50.....	19
Lord v. Steamship Co., 102 U. S. 541 .....	15
Luckenbach v. Denney, 80 Wash. 309 .....	34
Minnesota v. Blasius, 290 U. S. 1.....	16
Minnesota Rate Cases, 230 U. S. 352, 397.....	19
McNeely & Price Co. v. Phila. Piers Inc., 329 Pa. 113, 134 .....	34
Napier v. Atlantic Coastline R. Co., 272 U. S. 605, 613 .....	33
New York Central Railroad v. Winfield, 244 U. S. 147..	32
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 343 .....	20
Pennsylvania Railroad v. Public Service Commission, 250 U. S. 566 .....	32
Phila. & S. Mail S. S. Co. v. Penna., 122 U. S. 326....	16
Prigg v. Penna., 16 Pet. 539 .....	32
Postal Tel. Cable Co. v. Taylor, 192 U. S. 64.....	20
Savage v. Jones, 225 U. S. 501.....	19
Sprout v. South Bend, 277 U. S. 163.....	18, 20
U. S. Navig. Co. v. Cunard S. S. Co., 284 U. S. 474, 481..	32
Western Union v. Kansas, 216 U. S. 1 .....	18
Western Union v. New Hope, 187 U. S. 419.....	20

STATUTES.		Page
Act of Congress, March 28, 1916 (39 Stat. 38, p. 53) ..		36
Hawaiian Organic Act, Sec. 55 (39 Stat. 443) .....		35
Judicial Code, Sec. 240(a), as amended by Act of February 13, 1925 (U. S. C. Title 28, Sec. 347) .....		2
Merchant Marine Act of 1936 (49 Stat. 1985, U. S. C. Title 46, Secs. 1101-1246) .....		5, 6
Revised Laws of Hawaii 1925, Chapter 132,		
	3, 10, 12, 14, 18, 22, 23, 26, 28	
Revised Laws of Hawaii 1925, Sec. 2208 .....		3
Revised Laws of Hawaii 1925, Sec. 2193 .....		4
Revised Laws of Hawaii 1925, Sec. 2207 .....		4
Revised Laws of Hawaii 1925, Sec. 2210 .....		37
Session Laws of Hawaii 1913, Act 89, Section 17 .....		23
Session Laws of Hawaii 1913, Act 135 .....		9, 36
Shipping Act of 1916 (39 Stat. c. 451, p. 728, U. S. C. A. Titl 46, Sec. 801, et seq.) ...	2, 3, 5, 7, 10, 12, 13, 19, 30, 32, 33, 34	
Washington Sessions Laws of 1929, Chapter 107 .....		26

### INDEX TO APPENDIX.

Ch. 132, Revised Laws of Hawaii 1925 .....	41
Act 135, Session Laws of 1913 .....	48
Hawaiian Organic Act .....	56
Act of Congress of March 28, 1916 (39 Stat. at L. 38, c. 53) .....	49
Remington's Revised Statutes .....	57
Shipping Act, 1916 (U. S. C. A. Title 46, Sec. 801, et seq., 39 Stat. at L. c. 451, p. 728) .....	51
Session Laws of Hawaii, 1913, Act 89, Section 17 .....	47



## CHRONOLOGY.

- 1913 July 1 The Utility Act (Act 89 S. L. Hawaii 1913, appendix p. 41) became effective.
- 1913 April 28 Section 17 of the act (appendix p. 47) providing for "reasonable costs and fees" was amended to provide for the collection of fixed fees of 1/10 of one per cent on gross receipts plus 1/20 of one per cent of the capital stock of each utility payable annually (appendix p. 45).
- 1913 April 29 Act 135 S. L. of Hawaii 1913 enacted (appendix p. 47) effective on approval of Congress; this act made utilities holding federally approved franchises subject to the Utility Act.
- 1916 March 28 Act of Congress (39 Stat. 38, c. 53; appendix p. 49) approving Act 135 S. L. Hawaii became effective.
- 1916 September 7 Shipping Act, 1916 (39 Stat. c. 451, 46 U. S. C. Sec. 801, appendix p. 51) became effective.
- 1917 December 7 Supreme Court of Hawaii held the Commission was without jurisdiction to regulate the rates, fares and practices of petitioner and that its proceedings in that respect were void. In *Re Inter-Island*, 24 Hawaii 136, 148.
- 1930 June 1 Commission filed action in this cause for fees claimed to be due. (R: 1)

IN THE  
**Supreme Court of the United States**

OCTOBER 1938 TERM

---

No. 94

---

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
*Petitioner,*

v.

TERRITORY OF HAWAII by Public Utilities Commission  
of the Territory of Hawaii, *Respondent.*

---

**BRIEF ON BEHALF OF INTER-ISLAND STEAM  
NAVIGATION COMPANY, LIMITED.**

---

This cause is here on a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, which affirms the judgment of the Supreme Court of Hawaii filed January 21, 1937, affirming the judgment of the Circuit Court of the First Judi-



cial Circuit Territory of Hawaii (hereinafter called the trial court) in favor of respondent for the recovery of certain statutory fees asserted to be due from petitioner.

### OPINIONS BELOW.

Opinion of the Circuit Court of Appeals, filed April 16, 1938:

96 F. (2d) 412. (R. 318)

Opinions of the Supreme Court of Hawaii:

32 Hawaii 127. (R. 42)

33 Hawaii 890. (R. 259)

Opinion of the trial court (unreported), filed April 12, 1934. (R. 45)

### JURISDICTION.

The judgment of the Circuit Court of Appeals was filed on April 16, 1938. The petition for a writ of certiorari was filed in this Court on June 6, 1938 and granted on October 10, 1938. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is based on Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 225), which gives that court appellate jurisdiction to review final judgments of the Supreme Court of Hawaii in all cases wherein the Constitution or a statute of the United States is involved. This cause involves the Constitution of the United States, the Shipping Act of 1916 (39 Stat. c. 451; 46 U. S. C. Sec. 801, *et seq.*) and other federal statutes. The amount in controversy exceeds \$5,000.

## STATEMENT OF THE CASE.

This action was brought by the Public Utilities Commission of the Territory of Hawaii (hereafter called the Commission) to recover certain statutory fees claimed to be due from the petitioner for the years 1922-1930, inclusive, pursuant to Chapter 132,<sup>1</sup> Revised Laws of Hawaii 1925 (referred to herein as the "Utility Act").

Petitioner challenges the application of the Utility Act to it and also its validity as applied in this cause upon the ground that the fees, a substantial part of which are measured by a fixed percentage of its gross receipts from interstate and foreign commerce, are demanded for a purported inspection service which the Commission is without power to perform and which in fact during the nine years in question it has not performed; that the fees bear no reasonable relation to cost of inspection or supervision of petitioner and therefore impose an unconstitutional burden on interstate and foreign commerce, contrary to the commerce clause of the Constitution, are excessive under the due process clauses of the Fifth and Fourteenth Amendments; and that the Utility Act so far as it relates to petitioner has been superseded by the Shipping Act, 1916.

The relevant provisions of the Utility Act are:

*Rev. L. Hawaii 1925, Section 2208*

"The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may \* \* \* operate,

<sup>1</sup> The Utility Act was originally Act 89, Session Laws of Hawaii 1913, amended by Act 127 Session Laws of Hawaii 1913, and became Chapter 132 Revised Laws of Hawaii 1925, referred to herein as "Rev. L. Hawaii 1925"; this Chapter is summarized in Appendix, p. 41.

any plant or equipment, \* \* \* for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

*Rev. L. Hawaii 1925, Section 2193*

"The commission \* \* \* shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated, with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. \* \* \*"

*Rev. L. Hawaii 1925, Section 2207*

"\* \* \* all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March

and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages, and expenses authorized or prescribed by this chapter."

The Shipping Act of 1916<sup>2</sup> vests complete regulatory powers over common carriers by water in the Shipping Board and by its terms was made specifically applicable to transportation on the high seas between the ports of the Territory and hence to petitioner.

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession."  
(39 Stat. c. 451, p. 728; 46 U. S. C. Sec. 801.)

Twenty years ago the Supreme Court of Hawaii decided that Congress by enactment of the Shipping Act,

<sup>2</sup>Shipping Act, 1916 became effective September 7, 1916, 39 Stat. c. 451, p. 728; 46 U. S. C. Sec. 801-842; it is summarized in Appendix, p. 51; the powers of the Shipping Board have been transferred to the Maritime Commission under the Merchant Marine Act, 1936 (49 Stat. 1985, 46 U. S. C. Sec. 1101-1246).

1916 had ousted the Commission of all regulatory jurisdiction over this same Company. Since that decision the Commission has never made or attempted any supervision or inspection of petitioner's business, leaving this task with federal agencies charged with performing it under the acts of Congress. *In Re: I. I. S. N. Co.*, 24 Haw. 136.

Apart from the Shipping Act, 1916 petitioner is subject to what this Court has called "a maze of regulation." The federal acts<sup>3</sup> relating to its operations are "extremely detailed." *Kelly v. Washington*, 302 U. S. 1, 4.

There exists no conflict in the evidence; the facts are set forth in the opinions of the courts below and may be summarized as follows:

The Commission in its complaint filed June 1, 1930 alleged that it was duly constituted under the Utility Act, that petitioner, a Hawaiian corporation, operated a number of steam vessels carrying passengers and goods as a common carrier on the high seas between ports of Hawaii, and that by virtue of the Utility Act it was obliged to pay to the Commission the fees prescribed by the act. (R. 1)

The complaint further alleged that prior to the year 1922 petitioner paid the statutory fees, but since September 26, 1922, refused to pay; that the computation of the fees for the years 1922 to 1930 based upon one-tenth of one per cent of its annual gross receipts and

<sup>3</sup> The following are the more important federal statutes applicable to petitioner's business: 46 U. S. C. c. 14, relating to inspection of steam vessels; 46 U. S. C. c. 15, relating to transportation of passengers and goods by steam vessels; 46 U. S. C. c. 24, Merchant Marine Act of 1920; 46 U. S. C. c. 12, regulating vessels in domestic commerce; it would unduly encumber this brief to refer to the regulations promulgated by the several federal agencies pursuant to this legislation.



one-twenty-fifth of one per cent of its outstanding capital stock amounted to \$33,724.44, claimed to be due.

A demurrer was interposed to the complaint setting up that by virtue of the Shipping Act, 1916, which vested complete regulatory and supervisory powers over petitioner in the United States Shipping Board, the Commission was without power to require the payment of the fees demanded. (R. 7) This question was certified to the Supreme Court of Hawaii, which court held that although the Shipping Act, 1916 divested the Commission of all regulatory powers it did not prevent investigation by the Commission, and that "since the power to investigate exists, the power to defray the expenses of such investigation follows." (R. 26)

The cause was remanded to the trial court for hearing on the merits. The demurrer was overruled. Petitioner filed its answer (R. 29-30), which denied liability for the payment of the fees; denied the jurisdiction of the Commission over its business; alleged that it was engaged in part in the business of a common carrier by water in interstate and foreign commerce; that the fees demanded constitute an unreasonable burden on the interstate and foreign commerce; that the sum of \$33,724.44 bore no relation to the cost of supervision and inspection, and that no inspection or supervision of it was ever made by the Commission; that the imposition of the fees demanded is repugnant to the Fifth and Fourteenth Amendments to the Constitution; and that the fees demanded under the Utility Act conflict with the Shipping Act, 1916.

The trial court found that 75 per cent of petitioner's annual gross freight receipts during the years in question (\$10,321,559.; R. 74) was from the carriage of goods in a continuous journey in interstate and foreign

commerce (R. 55, 56); that during the period in question (1922 to 1930) no investigation of petitioner had been made by the Commission; that no services had been performed by the Commission on its account or for its benefit; that the only time spent by the Commission upon petitioner was three one-half hour examinations of its books for the purpose of ascertaining the fees claimed to be due. These facts were stipulated at the trial. (R. 41, 43, 47)

It is an undisputed fact that public utilities doing business in the Territory of Hawaii are divided into two groups,<sup>4</sup> group A being those utilities which are subject to exclusive federal supervision and control and group B, those utilities which are not subject to federal regulation and control but are under the exclusive jurisdiction of the local Commission (R. 69). Petitioner is in group A since it is subject to complete federal control and supervision. The vast majority of the work of the Commission was and is devoted to supervising and regulating those utilities subject to the exclusive jurisdiction of the Commission. The services performed by the Commission in respect to group A utilities are of a minor nature. (R. 113-115) Notwithstanding this fact, the statute purports to exact the same identical fee from utilities which are subject to exclusive federal regulation as it does from those utilities subject to regulation by the local Commission exclusively. The Commission's auditor testified that there was "very little relation" between the fees paid and the services performed. (R. 152)

---

<sup>4</sup> This classification is not contained in the Utility Act but exists as a matter of fact under existing federal legislation; the Utility Act makes no such classification but demands the same fees from utilities under complete federal supervision and control which are demanded from those utilities over which the Commission has exclusive regulatory power.

The trial court ruled that since petitioner was engaged in interstate and foreign commerce, the Territory, without the approval of Congress, had no power to exact from it the fees provided for by the Utility Act (R. 56); and that Congress, upon the approval of Act 135, Session Laws of Hawaii 1913,<sup>5</sup> validated what would otherwise be an unconstitutional burden on interstate and foreign commerce. A judgment for \$53,435.55 (the fees with interest) was entered in favor of the Commission. (R. 66)

Petitioner appealed from this judgment to the Supreme Court of Hawaii. That court did not pass upon the ground upon which the trial court rested its decision; it affirmed the ruling that petitioner was engaged in interstate and foreign commerce.

"The record discloses and it was found by the court below to be a fact that 75 per cent of the defendant's gross annual freight receipts was derived from freight carried by it in commerce with foreign nations and among the several States."  
(R. 264)

The Supreme Court of Hawaii also affirmed the finding of the trial court that the Commission had made no inspection and expended nothing in the supervision, inspection, or regulation of petitioner.

"The trial court at the request of the defendant found, and we think correctly, that during the year 1922 to date "no services were ever performed by the public utilities commission in connection with the defendant utility, and that the only time spent by the public utilities commission on the business of this defendant was on three separate

<sup>5</sup> This act placed certain franchise-bearing corporations under the jurisdiction of the Utility Act, see Appendix, p. 49.

occasions of one-half hour each" in which the auditor of the Commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed \$30.00 gross' and that 'only such service as indicated was in fact rendered directly as a service which could be characterized as "on behalf of the defendant." ' ' (R. 277, 278)

The Supreme Court of Hawaii reaffirmed its previous ruling that the passage of the Shipping Act, 1916 did not deprive the Commission of the right to collect the fees notwithstanding it had no regulatory powers over petitioner; held that the burden of proving the fees unreasonable was upon petitioner and that it failed to sustain that burden; that the court was bound by the legislative determination of the reasonableness of the fees; and that they imposed no unconstitutional burden on interstate and foreign commerce, and were valid under the Fifth and Fourteenth Amendments. (R. 281)

The court below concurred in the findings of the trial court and the Supreme Court of Hawaii to the effect that petitioner was engaged in interstate and foreign commerce to the extent of 75 per cent of its gross freight receipts (R. 325, 330), and that the Commission had made no inspection or investigation of it during the years in question. (R. 325, 326)

The court below then ruled that the Commission had the power of investigating petitioner's business. It examined the basis of the decision of the trial court to the effect that Congress had approved the Utility Act and held that upon the enactment of the Shipping Act Congress withdrew its approval and took over the field of the regulation of commerce upon the high seas; that although the Shipping Act, 1916 superseded the terri-

torial legislation, nevertheless the Commission retained power of investigation and regulation over commerce strictly local in character.

"Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce." (R. 334)

The court below then examined the question of the validity of an inspection fee measured by the gross receipts from interstate and foreign commerce; held that the burden of proof was upon the Commission to establish the fact that the fees are not disproportionate to the services rendered, and concluded that the Commission "must be deemed to have sustained that burden." (R. 335)

The court below pointed out that the expenditures by the Commission (regulating utilities other than petitioner) exceeded the total collections made by the Commission from all utilities and that the deficit had to be met by a legislative appropriation. (R. 336)

From this the court below concluded that the fees demanded of petitioner were not unreasonable or disproportionate to the services rendered to other utilities and sustained the exaction notwithstanding the fact that no services were rendered and no expense was incurred by the Commission in connection with this petitioner.

Although it was presented by the Assignment of Errors<sup>a</sup> and urged in the brief, the court below did not

<sup>a</sup> R. 293, errors numbered 4, 6, 9, and 10.



pass upon the validity of the fees under the Fifth and Fourteenth Amendments to the Constitution. The judgment of the Supreme Court of Hawaii was affirmed.

### **ERRORS TO BE URGED.**

The Circuit Court of Appeals erred in:

(1) Holding that the Commission had sustained the burden of proof as to the reasonableness of the challenged fees when in fact it is conceded that no inspection, supervision, or regulation of petitioner has been made during the period in question and the Commission has incurred no expense whatever on account of petitioner in any inspection, supervision, or regulation;

(2) Failing to hold that the inspection fees demanded in this cause are void under the Fifth and Fourteenth Amendments to the Federal Constitution where it appears that no inspection, supervision, or regulation has ever been made by the Commission during the nine years in question;

(3) Holding that the Utility Act applies to petitioner;

(4) Holding that the enactment of the Shipping Act of 1916 by Congress did not deprive the Commission of jurisdiction over petitioner, including the right to collect fees prescribed in the Utility Act;

(5) Holding that the fees prescribed in the Utility Act did not constitute a burden on interstate and foreign commerce, imports and exports, in violation of the Federal Constitution.

### SUMMARY OF ARGUMENT.

The Circuit Court of Appeals erred in not holding that the inspection fees herein demanded which impinged upon petitioner's gross receipts from interstate, foreign and local commerce bore no relationship to the cost of inspection and supervision for the reason that the amount of earnings of petitioner and its capital stock afford no yardstick for determining the necessity or extent of inspection and supervision. Moreover, the court below erred in holding that the Commission had sustained the burden of proof as to the reasonableness of the challenged fees because the total receipts of the Commission from all utilities in the Territory were less than its total disbursements. The vital issue is whether the challenged fees are reasonable as to petitioner, not whether the Commission has spent all of the funds which have come into its hands since its organization. The fact that substantially all of the duties of the Commission are related to those utilities over which the Commission has complete and exclusive jurisdiction shows conclusively that the exaction of the identical fee from a utility under complete federal regulation is neither reasonable nor proportionate to the service performed or required.

We contend that the challenged fees are void under the Fifth and Fourteenth Amendments to the Federal Constitution in view of the admitted fact that during the nine years in question no inspection, supervision, or regulation has ever been made or attempted by the Commission with respect to this petitioner.

We further contend that with the enactment of the Shipping Act, 1916 and related federal legislation, Congress has placed the supervision and regulation of petitioner's business completely in the hands of federal

agencies and accordingly all power of the local Commission, including the power to collect the challenged fees, is unequivocally withdrawn. The Shipping Act, 1916 by its express terms applies to all transportation by water between the ports of Hawaii and the Circuit Court of Appeals' declaration that the act did not apply to purely local commerce between ports of the Territory is contrary to the plain language of the act. The holding of the court below that the Shipping Act 1916 was not effective as to intrastate commerce until the Board's representatives chose to exercise the powers and perform the duties entrusted to them under the act of Congress is an erroneous test of the delegation of legislative power.

Moreover, since the Utility Act itself expressly declares that it shall not apply to interstate and foreign commerce and since under the established facts petitioner is engaged in interstate and foreign commerce (to the extent of 42.2 per cent of its gross revenues) it follows that the Utility Act does not apply to it.

We further contend that the attempt on the part of the Commission to sustain the erroneous judgment of the Circuit Court of Appeals upon a ground rejected by that court and not even considered by the Supreme Court of Hawaii to the effect that Congress has approved the levying of what would otherwise be unconstitutional burdens on interstate and foreign commerce, is wholly without merit.

## ARGUMENT.

### I.

**The Inspection Fees Demanded Admittedly Bear No Relation to the Cost of Inspection or Regulation and, Therefore, Impose Unconstitutional Burdens on Interstate and Foreign Commerce, and Are Void Under the Fifth and Fourteenth Amendments.**

The finding of the court below affirming the findings of the trial court and the Supreme Court of Hawaii settles the fact that 75 per cent of petitioner's annual gross freight receipts were derived from the carriage of goods in interstate and foreign commerce. This business amounted to more than three-quarters of a million dollars annually or 42.2 per cent of petitioner's gross revenues. (R. 74)

The 75 per cent of petitioner's gross freight receipts found by all the lower courts to be interstate and foreign commerce was receipts from transportation of cargo on the high-seas as a link in a continuous journey between ports of Hawaii and ports of continental United States and foreign countries. The fact of the continuity of transit from the several states and foreign countries to ports of Hawaii was stipulated at the trial. (R. 212) hence this business is interstate and foreign commerce.

*Lord v. Steamship Company*, 102 U. S. 541;  
*Galveston Ry. Co. v. Texas*, 210 U. S. 217, 224,  
 228;

*Carson Petroleum Co. v. Vial*, 279 U. S. 94, 101.

It is conceded that the Commission has at no time during the period in question made any inspection, regulation, or supervision of petitioner's business, and incurred no expense on its account. Under these cir-

cumstances we contend that the inspection fees amounting to more than \$4,000.00 per annum levied against petitioner's business indiscriminately (local, interstate, and foreign) are void as a direct burden on interstate and foreign commerce and deny to petitioner due process of law.

- (1) The Territory cannot burden interstate and foreign commerce.

Under the commerce clause of the Federal Constitution, Congress is given the power to regulate interstate and foreign commerce and no state may burden such commerce, no matter what form the exaction takes (*Minnesota v. Blasius*, 290 U. S. 1, 9), and this whether a foreign or domestic corporation is involved (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 344; *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196).

The limitations upon a territory with respect to burdening interstate and foreign commerce are the same as those imposed upon states. This was recognized by the court below:

"\* \* \* we think, as a practical matter, a territory must be considered in the same category as a state, and that the commerce clause is applicable to such territory. \* \* \* If that point was not expressly so decided in *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, and *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, it was so implied." (R. 328)



- (2) The challenged fees are levied upon petitioner's interstate foreign and local business indiscriminately; this is an improper subject matter, hence the fees are invalid.

Any fee or tax laid on interstate or foreign commerce or the gross receipts therefrom or the right to engage in such commerce is invalid. The Commission will urge that since the petitioner also does, in addition to interstate and foreign commerce, a purely local business that therefore the Territory has the power to levy a burden upon all of the business of petitioner.

The vice of the exactions challenged here is that they are not taxes levied on local business but are fees levied against the entire business of petitioner without distinguishing or discriminating between that part of the business upon which a fee may be properly levied and that part of the business upon which the fee can not be levied.

The decisions of this Court make it clear that when a state attempts to levy such fees upon a corporation doing both local and interstate commerce then unless the statute by its terms is imposed solely on the local business the fact that the corporation does local business as well as interstate business is immaterial and the entire levy must fail. *Leloup v. Mobile*, 127 U. S. 640, where this Court held void a flat license tax of \$225.00 on telegraph companies where the company did both local and interstate business:

"\* \* \* The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

The fees demanded in this cause "affect the whole business without discrimination" and "cover the entire operations of the company". It therefore follows that the fees as applied to petitioner are imposed upon an improper subject matter and are void.

See *Allen v. Pullman's Palace Car Company*, 191 U. S. 171. The fact that the Territory may not actually have intended to burden interstate or foreign commerce is immaterial. *Western Union v. Kansas*, 216 U. S. 1, 27.

In *Sprout v. South Bend*, 277 U. S. 163, a fee was imposed upon a carrier doing both interstate and intrastate business. In holding it invalid this Court after remarking that a state might by appropriate legislation require the payment of an occupation tax from one engaged in both intrastate and interstate commerce said:

"\* \* \* But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intra-state business." (p. 171.)

We contend that the Utility Act as construed by the court below making the fees attach to the total business of petitioner (foreign, interstate and local) is upon an improper subject matter and the challenged levy must fail regardless of the measure of the fees which is equally invalid. We now turn to the question whether the fees may be sustained as an inspection measure.

(3) The justification for all inspection fees must rest in the police power.

Whenever a state or a territory purports to exercise its police power to exact inspection fees from a carrier engaged in interstate and foreign commerce to defray

the expense incurred, two problems are presented: first, whether the federal statutes on the same matter exclude state regulation; and, second, do the fees burden interstate and foreign commerce. *Minnesota Rate Cases*, 230 U. S. 352, 397. Any state or territorial legislation affecting interstate commerce must meet this double test. If a state statute does burden interstate commerce, then whether it is in conflict with a federal statute or not need not be considered. *Lemke v. Farmer's Grain*, 258 U. S. 50. Likewise a determination that a state statute does not burden interstate commerce leaves open the question whether the statute is in conflict with applicable federal legislation. *Savage v. Jones*, 225 U. S. 501. Conversely, a decision that the act does not conflict with a federal statute leaves open the question whether or not the fees imposed in fact burden interstate and foreign commerce.

We contend, first, that the exaction of the fees under the Utility Act imposes an unconstitutional burden on interstate and foreign commerce and cannot be justified under the police power; and, second, assuming that reasonable fees representing the cost of investigation may be collected from a carrier engaged in interstate and foreign commerce, the fees here demanded are so unreasonable and admittedly bear no relation to the services rendered, that they are therefore void.

Assuming for the purposes of this discussion that the Shipping Act, 1916 does not prevent collection of these fees and that some fees may be collected from a corporation engaged in interstate and foreign commerce, we turn at once to the question whether or not the fees can be considered as proportionate to the cost and expenses of the alleged investigation.

The second clause of Section 10, Article I, of the United States Constitution, provides:

“\* \* \* No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws \* \* \*”

The Constitution does not expressly grant to the states the power to levy inspection fees on goods in interstate commerce; nevertheless the principle embodied in the foregoing clause of the Constitution has been extended to such commerce. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345; *Great Northern Ry. Co. v. State of Washington*, 300 U. S. 154. All attempts by a state to exact fees for their police measures rest upon the same basis as the power to levy inspection fees. *Sprout v. South Bend*, 277 U. S. 163. Hence, all inspection fees of whatever kind or description must not exceed the reasonable cost of inspection.

*Foot & Co. v. Stanley*, 232 U. S. 494;  
*A. & P. Tel. Co. v. Phila.*, 190 U. S. 160;  
*Western Union v. New Hope*, 187 U. S. 419;  
*Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64.

- (4) The fees demanded bear no reasonable relation to the cost of inspection and supervision, and since they are exacted from Petitioner, which does both interstate and local commerce, they must necessarily fall under the commerce clause.

As we have already noted, all three of the lower courts have held that the petitioner was engaged in interstate and foreign commerce. The Circuit Court of Appeals found that 42.2 per cent of petitioner's total revenues were derived from this source (R. 327), and held “\* \* \* as a practical matter a territory must be considered in the same category as a state and that the

commerce clause is applicable to such territory." (R. 328) The Commission endeavors to escape the force of these findings by stating that we claim "a constitutional immunity because certain \* \* \* freight before or after transportation \* \* \* is carried by other carriers in interstate and foreign commerce." (Brief in Opposition to Certiorari, p. 12) We of course contend no such thing. The undisputed evidence is, and the findings of all courts below affirm the fact, that 75 per cent of petitioner's gross freight receipts are derived from the carriage of goods as a link in a continuous journey in interstate and foreign commerce. That such an act of carriage although conducted wholly between ports of the Territory is in interstate and foreign commerce can not be denied. *Galveston Ry. Co. v. Texas*, 210 U. S. 217; *Atchison, Topeka Ry. v. Harold*, 241 U. S. 371; *Carson Petroleum Co. v. Vial*, 279 U. S. 95. Since it is established that petitioner is engaged in interstate and foreign commerce and that the challenged fees are inspection fees, they constitute a direct burden on interstate commerce and can be sustained only if they represent reasonable compensation for services performed or expenses incurred. *Interstate Transit Incorporated v. Lindsey*, 283 U. S. 183; *Ingels v. Morf*, 300 U. S. 290.

As we have seen before, utilities in Hawaii are divided into two distinct groups, those which are subject to federal control and those subject to territorial control exclusively. It is obvious that the need for supervision and regulation of the latter group is far greater than the need for inspection and supervision of the former. The Commission's services to the group under exclusive federal control were stated to be comparatively minor. (R. 115) Nearly all of the funds



exacted by the Commission from utilities operating in the Territory are in fact expended in the regulation and supervision of utilities over which the Commission has exclusive regulatory power. The Commission does not expend its funds on utilities already regulated and supervised by federal agencies. Upon cross-examination the auditor for the Commission testified:

"Q. What relation then, Mr. Eaton, is there between the fees paid by the utility companies and the services performed by the Commission in connection therewith?

"A. You ask the relation between the fees paid and the services performed?

"Q. Yes.

"A. It is my opinion there is very little relation. I believe the companies that paid the least amount of fees, at least in our experience, have been rendered the greatest services." (R. 152)

The fact that the fees are wholly unreasonable and disproportionate to the services performed is ably demonstrated by Commission's Exhibit A. (R. 69) This exhibit shows that from the period 1913 to 1930 the Commission (pursuant to the Utility Act) collected the sum of \$181,671.41 from group A utilities (those under federal supervision and regulation) and during the same period it collected from group B utilities (under exclusive territorial supervision and regulation) the sum of \$91,798.99. In other words the Commission collected twice as much from utilities it could not regulate as it did from those it could. Having made this disproportionate levy and collection in obedience to the Utility Act it thereupon proceeded to disburse the funds thus collected for the regulation of the utilities subject to the exclusive jurisdiction of the Commission.

The Commission's position throughout this cause has been that the challenged fees must be paid regardless of the fact that they bear no relation to the cost of inspection or investigation. It is contended that the reasonableness of the fees is not open to judicial inquiry because that fact has been concluded by the legislative fiat. Counsel are compelled to take this position because by the terms of the Utility Act which although originally providing for reasonable compensatory fees (Section 17, Appendix ), was later amended to its present form to exact a fixed annual charge, there being no provision in the Utility Act to vary the amount of the levy depending upon either the actual inspection or regulation or the necessity therefor. Counsel for the Commission have consistently maintained that the reasonableness of the challenged fees is wholly immaterial. In the trial court they stated:

"We contend that as a matter of law or will contend that it is immaterial entirely what the cost of making the investigations are of this company or any other company." (R. 120)

This view was accepted by the Supreme Court of Hawaii, which thought that the reasonableness of the fees "is a matter peculiarly within the province of the legislature to determine." (R. 281)

The novel suggestion is advanced that because we have not paid the fees demanded we are estopped to contest their validity. It would seem clear that it is not necessary for anyone to pay an unconstitutional levy in order to preserve a defense of its invalidity. If that were true, then no one could ever resist an unconstitutional exercise of power until he had first subjected himself to its operation. Moreover, the argument upon estoppel appears rather absurd when examined in the

light of the facts in this cause. From the year 1913 to 1921 petitioner did in fact pay these invalid fees and the only action of the Commission with respect to petitioner was to embark upon an attempt to regulate its rates in excess of the power of the Commission and contrary to the terms of the Shipping Act, 1916. This proceeding was declared void by the Supreme Court of Hawaii, *Re I. I. S. N. Co.*, 24 Haw. 136, 148.

Counsel for the Commission note the fact that it expended \$7,239.58 in connection with petitioner's business during the years 1916 and 1917. They fail to state, however, that this entire expenditure was upon a proceeding in excess of the Commission's jurisdiction and was declared void by the Supreme Court of Hawaii. The suggestion is apparently offered for the purpose of showing that at one time the Commission did spend funds upon the petitioner and that therefore the present levies are valid. The suggestion, however, is entirely without force in view of the fact that the expenditure was made under a mistaken view of its powers and, moreover, has no relevancy to the years 1922 to 1930, inclusive, the years in controversy.

Apparently the Commission's theory is that petitioner is obliged to continue payment of the unreasonable and disproportionate levies in perpetuity upon the theory that the Commission, although it has never exercised the asserted power to investigate and bring complaints before the federal bodies having jurisdiction, it may at some future time do so and this bare possibility is a sufficient basis upon which to predicate the validity of the challenged fees.

The Circuit Court of Appeals thought that the fact that 60 to 80 per cent of the receipts of the Commission were expended for the regulation and supervision of

utilities over which it had exclusive supervision and control was immaterial, giving for its reason "A citizen of a city paying taxes to support a police force cannot avoid payment of the tax on the ground that he has not used the service of the police." (R. 336) In other words, in the view of the court below the challenged inspection fees were valid even though they admittedly bore no relation to the cost of or need for inspection.

That the court below misconceived the very nature of inspection fees levied against interstate commerce is apparent. It thought that the reasonableness of the fees was determined by the fact that the Commission had expended all of the funds it had received from all sources and that a legislative appropriation was necessary to supplement its budget. If this were in reality a tax and not an inspection fee there might be some force in the argument (except for the fact that a tax laid upon gross receipts including those from interstate commerce is void). While a state may adopt an arbitrary measure of classification in the levying of excise or occupation taxes for the privilege of doing intrastate business, when it levies a charge which in reality is an inspection measure, it is confined in its levy to "fair compensation for what it gives." *Interstate Transit Incorporated v. Lindsey*, 283 U. S. 183. Hence the fact that this Commission has expended in past years all of its receipts derived under the Act is immaterial in determining the question whether the fee sought to be exacted from this petitioner bears any reasonable relation or proportion to the service rendered or inspection performed. We submit that the undisputed evidence conclusively establishes the fact that the fees demanded constitute an unreasonable

burden on interstate and foreign commerce; they bear no reasonable relation to the cost of inspection or investigation and must therefore fail.

- (5) Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities generally, the burden of proof is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection.

The Utility Act by definition applies to a large assortment of unrelated utilities, gas, electric, telephone, telegraph, and street railroad companies, wharfingers, warehousemen, and carriers by water. All are made liable for the fees irrespective of the character of their business, whether local, foreign, or interstate. The funds collected by the Commission are used for the most part in the regulation of utilities which are not subject to federal regulation. This presents the same situation that was before this Court in *Great Northern Ry. Co. v. State of Washington*, 300 U. S. 154. This Court held that under such circumstances the burden of proof was upon the state to establish the reasonableness of the fees as to the Great Northern Railway.

The Supreme Court of Hawaii held that the burden of proof was on petitioner and that it had failed to sustain the burden.

That court held the test of reasonableness was not the cost or expense to which the Commission was put

The fees levied by the Utility Act differ from those imposed by the Washington statute in that the former impinge indiscriminately on local, interstate, and foreign business while the latter were confined to local business; hence, the Utility Act as construed by the court below is open to the charge that as to this petitioner the act is void on its face. The Washington statute held invalid is printed in Appendix, p. 57.



in regulating and inspecting petitioner, but what would have been a reasonable expense had the Commission made any inspection.

"It does not appear from the Act itself, and the record is silent on the subject, that the amounts sought to be collected from the defendant for the years in question would exceed that necessary to meet the expense of its investigation had the commission found it necessary to perform this duty."  
(R. 281)

The decision of the Supreme Court of Hawaii was rendered on July 25, 1936, and that court did not have before it the decision of this Court in *Great Northern Ry. Co. v. State of Washington*, which case was decided February 1, 1937.

The court below, however, reversed the ruling of the Supreme Court of Hawaii on the question of the burden of proof, but concluded (despite the fact there was no evidence to support the conclusion) that:

"We believe Appellee (the Commission) 'must be deemed to have sustained that burden' as stated in *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 187."  
(R. 335)

In other words, in face of an inspection fee levied against a number of unrelated public utilities and deposited in a common fund for the regulation of all, and in face of the undisputed evidence that the Commission in this cause has never expended any sum in the inspection, supervision, or regulation of petitioner during the entire period (nine years) under consideration, the court below has held that the Commission has sustained the burden of proof that the fees here demanded are reasonable.

- (6) The uncontradicted evidence is that the Commission has expended nothing for nine years in regulating or inspecting Petitioner; this fact is conclusive that inspection fees of \$4,000.00 per annum are excessive.

If a state or a public utility commission may be said to have sustained the burden of proof in a case where it has put on literally no evidence as to the cost of inspection and admits that no inspection or supervision has ever been made by it, then the holding of this Court in *Great Northern Ry. Co. v. State of Washington* is in truth overruled by the decision of the court below in this cause.

The authority for the statement by the court below that the Commission has sustained the burden of proof is *Bourjois, Inc. v. Chapman* (supra). In that case only a nominal fee was involved and an injunction was sought prior to the effective date of the act. In other words, at the time the statute was questioned in that case no expenses in investigation had been incurred since the act was not yet in operation. To apply such a case to the facts presented in this cause appears to us absurd, for, in the case here under consideration, this Commission has not lifted a finger in the regulation, supervision, or inspection of petitioner for nine years, and at the same time says that \$4,000.00 a year is a reasonable inspection fee.

The court below misunderstood the holding of this Court in *Great Northern Ry. Co. v. State of Washington*, for it examines the record and comes to the conclusion that, since the total receipts of the Commission under the Utility Act were less than its total disbursements, therefore the fees assessed against petitioner are reasonable. This is the very thing which this Court has said is not the law. Where fees are collected

and deposited in a common fund for the regulation of a number of public utilities, it must appear that the fees collected from the particular public utility in question are reasonable. The issue involved is not whether the Commission has from all sources obtained a reasonable sum for the performance of its general duties in connection with all other utilities, but rather has the Commission collected a reasonable fee against a particular utility, which fee represents the reasonable expenses incurred in the investigation and regulation of that utility?

That the court below misunderstood the nature of inspection fees and the decision of this Court in *Great Northern Ry. Co. v. State of Washington* (supra) is apparent from the following statement:

"There is here no charge that the exaction is to be used for a purpose other than the legitimate one of supervision and regulation." (R. 335)

From this the court's idea of a reasonable inspection fee is not to defray any expense which has been incurred in inspection, but a holding that, if the fee is in the future to be used for the purpose of supervision and regulation, then it is valid. If this were the criterion, then no inspection fee could ever be challenged as excessive for the reason that the inspecting agency could always assert that, although it had incurred no expense to date in inspection and regulation, it contemplated that some time in the indefinite future, expenses in inspection would be incurred, and that the sums collected from the utility would in the future be used for the purpose of regulating it. Under the view of the court below no force is attributed to the palpable fact that in this cause the Commission has expended nothing on petitioner for more than nine years.

The Commission's long history of non-supervision and non-regulation of petitioner reflects the fact that regulatory jurisdiction has been turned over to federal agencies. To square with constitutional principles the Legislature of Hawaii should have reduced the fees to be collected from petitioner to a sum comparable to the amount expended by the Commission on its behalf. The failure to do this renders the whole charge void.

*Foote v. Stanley*, 232 U. S. 494;  
*Great Northern Ry. Co. v. State of Washington*,  
 300 U. S. 154.

- (7) The fees sought to be collected are so excessive as to amount to a taking of Petitioner's property without due process of law in violation of the Fifth and Fourteenth Amendments.

We contend that the fees here demanded are void under the Fifth and Fourteenth Amendments to the Federal Constitution. We recognize that there may be doubt as to whether the Fourteenth Amendment which, strictly speaking, is a restraint upon states, has any application in a territory. Nevertheless, the guarantees afforded to persons and corporations of the states under the Fourteenth Amendment are afforded to persons and corporations in the territories under the Fifth Amendment.

*Farrington v. Tokushige*, 273 U. S. 284, 299.

Petitioner is subject to complete federal control by the Shipping Board under the Shipping Act, 1916 (Infra p. 32). Evidence was tendered and rejected which would have shown the minute detail of federal regulation (R. 213-215). The Commission concedes that it has no power of regulation over petitioner or to compel petitioner to act in any matters covered by the Shipping Act, 1916 and related federal legislation.

We concede that where a particular class must be inspected or investigated by the state it is proper to make the members of the class bear the burden of the cost of investigation. Superficially, the Utility Act would seem to treat all utilities alike by compelling them to contribute to a common fund used for the investigation of utilities generally. It is clear that a statute valid on its face may be invalid in its application.

The evidence in this cause is undisputed that the fees sought to be collected have no relation to expenditures on petitioner's account. In substance, the exaction of fees amounting to \$4,000.00 annually, is made not for the purpose of investigating petitioner, but for the purpose of investigating other utilities over which the Commission has regulatory jurisdiction. Hence, apart from the fact that these fees burden interstate and foreign commerce, we contend they are so excessive as to deny petitioner due process of law.

What we have already said as to the unreasonableness of the fees as a burden on interstate and foreign commerce applies equally to this contention that the fees are excessive under the Fifth and Fourteenth Amendments. It is to be remembered that the Legislature is not exercising the taxing power in levying the fees here challenged, but is exercising its police power for the purpose of defraying the cost of investigation and inspection. Measured by any yardstick, the fees here in question, exceeding \$4,000.00 per annum, exacted for doing nothing in a subject matter in which Congress has already acted and deposited regulatory power in federal agencies, cannot be justified under the Fifth or Fourteenth Amendments.



## II.

**Under the Proper Construction of the Shipping Act, 1916 and the Utility Act, the Commission Has No Jurisdiction Over the Petitioner and Cannot Collect the Fees Demanded.**

Apart from the matters discussed under Point I in this brief, we contend that as a matter of statutory construction of the Utility Act and the Shipping Act, 1916 these fees cannot be collected.

Upon the enactment of the Shipping Act, 1916 Congress took over the field of regulating transportation on the high seas within the Territory and petitioner was placed under the jurisdiction of the Shipping Board (*Re: I. I. S. N. Co.*, 24 Haw. 136). As this Court has said the Shipping Act, 1916 "closely parallels the Interstate Commerce Act; and \* \* \* Congress intended that the two Acts, each in its own field, should have like interpretation, application, and effect." *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481.

The exclusive effect of Congressional action in the field of interstate commerce has been settled by this Court (*Chicago R. I. & P R. Co. v. Hardwick Farmers Elev. Co.*, 226 U. S. 426; *Penn. Railroad v. Public Service Commission*, 250 U. S. 566), and the court below correctly held that the same rule applied to this cause:

"The exclusive effect of Congressional action is quite clear. Thus in the case last cited, it is said that 'there can be no divided authority over interstate commerce.' The states may not 'complement' the act of Congress, or prescribe 'additional regulations' or 'auxiliary provisions for the same purpose' (*Prigg v. Pennsylvania*, 41 U. S. [16 Pet.] 536, 617; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 153), nor 'supplement' such act." (R. 331)

However, the court below then distinguished between intrastate commerce and interstate commerce, holding that as to the former (commerce between ports of the Territory) the Shipping Act, 1916 did not supersede the Utility Act for the reason that there was no evidence to show that the Shipping Board had actually performed the duties devolving upon it under the terms of the act.

"Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce." (R. 334)

This ruling is in direct conflict with the decision of this Court in *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 613:

"The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power."

The exclusive effect of Congressional action in this field cannot be made dependent upon the activity or non-activity of the employees of the federal agency designated by Congress to perform the duties prescribed in the act. If this were so, then a failure on the part of the personnel of any federal agency to perform its statutory duties would be sufficient to justify the states or territories in proceeding with regulation in the face of a Congressional statute on the subject. Carried to its logical extreme, it would mean that, so

long as active regulation was conducted by the federal agency, state or territorial power would be superseded, but whenever the federal agency ceased to act, state or territorial power at once would be called into being.

Furthermore, the court below completely overlooked the fact that the Shipping Act, 1916 placed in the Shipping Board jurisdiction over all transportation by water on the high seas between ports of the Territory. This Congress could do in the exercise of its plenary power over territories. Therefore, regardless of the nature of the commerce, whether intrastate or interstate, there was nothing left within the jurisdiction of the local Commission; Congress had completely taken over the field.

*Luckenbach v. Denny*, 152 Wash. 548, 559.

*McNeely & Price Co. v. Phila. Piers, Inc.*, 329 Pa. 113, 134.

### III.

**Counsel's Attempt to Justify the Erroneous Judgment Below Upon a Ground Ignored by the Supreme Court of Hawaii and Rejected by the Circuit Court of Appeals is Without Merit.**

We will not encumber this brief with any full discussion of the basis upon which the trial court rendered its decision in this cause. In brief, the trial court found that the challenged fees burdened interstate and foreign commerce, were invalid in the absence of Congressional approval, that Congress had approved the Utility Act, thereby validating what would otherwise be unconstitutional burdens on interstate and foreign commerce. The basis of the trial court decision was so obviously unsound that it was ignored by the Supreme Court of Hawaii. The Circuit Court of Appeals, how-

ever, referred to it and rejected the conclusion of the trial court.

The court below, in the course of its opinion, says:

"Appellee contends that Congress expressly ratified the act creating the commission by its Act of March 28, 1916. Appellant seems not to differ with that view, and we may here assume that Congress did consent to regulation of interstate and foreign commerce within the Territory by appellee. But it is obvious that some five months later Congress withdrew its consent to regulation of such commerce, \* \* \* by enactment of the Shipping Act." (R. 330)

Were it not for the remark that we seemed "not to differ with that view" we would not discuss this phase of the case at all. We are at a loss to discover how the court below assumed that we did not differ from the contention that Congress had approved the regulation of interstate and foreign commerce by the Commission; the contrary view was fully presented both in the briefs and argument. Lest we be deemed to acquiesce in this remark of the court below we will briefly summarize our contentions on this point.

At the outset it should be borne in mind that the Utility Act was never submitted to Congress for its approval. Section 55 of the Hawaiian Organic Act<sup>1</sup> provides that "no special or exclusive" franchises may be granted by the Territory without Congressional approval. A number of utilities (other than petitioner) doing business in the Territory held franchises approved by Congress, and with the enactment of the Utility Act in 1913 it was thought advisable to make those franchises specifically subject to the Utility Act;

<sup>1</sup> 31 Stat. 150, Appendix, p. 57.

hence, Act 135 of the Session Laws of Hawaii 1913 was passed (Appendix p. 48). The purpose of this act was to make sure that public utilities holding franchises would be subject to the provisions of the Utility Act (Opinion, Supreme Court of Hawaii, R. 17). It had nothing to do with the obtaining of Congressional approval to the exaction of the fees prescribed by the Utility Act.

Act 135, Session Laws of 1913, was entitled:

“An Act

Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto.”

The body of Act 135 provided that certain franchises which had been granted by the Legislature of Hawaii and approved by Congress and “the persons and corporations holding said franchises shall \* \* \* be subject to the provisions of Act 89 (the Utility Act).” This Act 135 did not apply to petitioner for the reason that it never held a franchise from the Territory. Moreover since petitioner in 1913 was a public utility within the meaning of the Utility Act there was no occasion for additional legislation with respect to it. Act 135 was approved and amended by Congress on March 28, 1916 (39 Stat. 38, c. 53, Appendix p. 49), an Act entitled:

“An Act

To ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.”



Congress adding to the territorial act the following language:

“\* \* \* all franchises heretofore granted to any other public utility or public utility company and all public utilities and public utilities companies organized or operating within the Territory of Hawaii \* \* \*.”

When Act 135 was approved by Congress petitioner was not included by the language inserted by Congress under the rule of *noscitur a sociis*. Congress probably intended to make sure that all franchise-bearing corporations were made subject to the provisions of the Utility Act. This was the view taken by the Supreme Court of Hawaii (*In Re: I. I. S. N. Co.*, 24 Haw. 136, 145), and this construction is further borne out by the fact that the title to the act remained unchanged.

Assuming that petitioner does fall within the language inserted by the act of Congress, it by no means follows that the act of Congress has the effect of giving Congressional assent to the burdening of interstate and foreign commerce by the collection of the fees here in question.

The short answer to the reasoning of the trial court is that no act of Congress can be pointed to whereby Congress has approved the burdening of interstate and foreign commerce by the Territory. In fact in the Utility Act the Territory expressly disclaimed any intention to interfere with interstate or foreign commerce.

“This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States \* \* \*.”

(Rev. L. Hawaii 1925 Section 2210)

The trial court ruled that when Congress approved Act 135 (which Act subjected certain franchise-bearing utilities to the Utility Act), it indirectly approved the Utility Act, and that, since Congress in this roundabout manner "approved" the Utility Act, which Act itself provided that it should not apply to interstate or foreign commerce, then the very "approval" of the Utility Act *ipso facto* changed the Utility Act to make it specifically applicable to interstate and foreign commerce.

To put it another way, in the view of the trial court, Congress approved a territorial statute, which statute expressly stated that it did not apply to interstate and foreign commerce; hence, the act of Congress in approving the territorial statute had the effect of changing it so that it forthwith applied to interstate and foreign commerce. Undoubtedly, because of this specious reasoning the Supreme Court of Hawaii ignored the basis of the trial court's decision.

As we have said before, the Circuit Court of Appeals noticed and rejected the conclusion of the trial court, the Circuit Court of Appeals ruling that, even assuming that Congress had approved the Utility Act, with the enactment of the Shipping Act it thereby withdrew its approval.

Either of the reasons stated above is a conclusive answer to the trial court's curious conclusion that Congress had approved the levying of what would otherwise be unconstitutional burdens on interstate and foreign commerce by the Territory of Hawaii.

### CONCLUSION.

The respondent in this cause asserts the right to exact inspection fees in substantial sums from petitioner, a steamship company under full and complete regulation by federal agencies. The findings of all of the courts below are that petitioner during the years in question did a substantial business in the carriage of goods in interstate and foreign commerce and that during this period the Commission has expended nothing in the regulation or inspection of petitioner.

We have shown that the fees here demanded are laid indiscriminately on interstate, foreign and local commerce of petitioner and hence are upon a subject matter which the Territory is without power to burden. Moreover, the uncontradicted evidence is that these fees bear no relation to the cost of or need for inspection or supervision and that in fact petitioner is a member of a class of utilities under the complete regulation of federal agencies and the sums demanded from this class are upon the identical basis as the fees demanded of that class of utilities over which the Commission has exclusive jurisdiction. This alone is sufficient to render the fees invalid.

The Circuit Court of Appeals, in face of an authoritative decision by this Court to the contrary (*Great Northern Ry. Co. v. State of Washington*), has declared that fees in the sum of \$4,000.00 per annum are reasonable inspection fees notwithstanding the fact that the record discloses, and the Commission concedes, that no inspection was made and no expense was incurred by it on petitioner's account. The holding is a result of a misunderstanding of the nature of inspection fees and the basis of their justification, and the re-

sult of a misapplication of the decisions of this Court. It should not be permitted to stand.

The court below has also laid down a palpably erroneous rule on the interpretation of the delegation of legislative power to the effect that, until the agents of the Shipping Board exercise their powers, the Shipping Act, 1916 does not have the effect of superseding territorial legislation. This again is in direct conflict with the decisions of this Court.

We submit that the judgment below should be reversed and that the complaint should be dismissed.

Respectfully submitted,

GARNER ANTHONY,  
*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY,  
*Of Counsel.*

Dated Washington, D. C.,  
October 27, 1938.

# APPENDIX



# APPENDIX

**APPENDIX.**

For convenient reference, here follows a digest of the applicable territorial and federal statutes, the pertinent portions of which are quoted verbatim and are so indicated by quotation marks:

*Ch. 132, Revised Laws of Hawaii 1925:*

This statute was originally Act 89 of the Session Laws of 1913, as amended by Act 127 of the Session Laws of 1913, and took effect on July 1, 1913; the reference to sections are to Revised Laws of Hawaii 1925.

Sec. 2189 provides for the number and appointment of commissions.

Sec. 2190 empowers the Commission to appoint attorneys, engineers, accountants, and other assistants.

Sec. 2191 provides for an annual report by the Commission to the Governor.

Sec. 2192 gives the Commission general supervision over all public utilities in the Territory.

Sec. 2193 provides:

“The commission and each commissioner shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial

and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. - Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum."

Sec. 2194 obliges all public utilities, upon request, to permit examination of the books and furnish required information.

Sec. 2195 requires each utility to report accidents to the Commission.

Sec. 2196 empowers the Commission to take testimony, compel the attendance of witnesses, and the production of evidence.

Sec. 2197 requires each utility to publish its rates, charges and rules in the manner required by the Commission.

Sec. 2198 provides for notices to utilities of hearings on proceedings and complaints.

Sec. 2199 permits a utility to appear by counsel and examine any witnesses called.

Sec. 2200 empowers the Commission to make rules respecting procedure.

Sec. 2201 provides:

"If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best."

Sec. 2202 provides:

"All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its



own motion, or upon complaint, and in so far as it is not prevented by the Constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part."

Sec. 2203 empowers the Commission to investigate rates made by persons holding water leases from the Territory of Hawaii.

Sec. 2204 provides the procedure by the Commission to secure to consumers reasonable rates for water and to cancel water leases and licenses charging unreasonable rates.

Sec. 2205 provides a penalty of one thousand dollars for every violation of any order of the Commission or of any provision of this chapter.

Sec. 2206 provides that any person testifying falsely before the Commission shall be guilty of perjury.



Sec. 2207 provides:<sup>1</sup>

"All salaries, wages and expenses, including traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

Sec. 2208 provides:

"The term 'public utility' as used in this chapter shall mean and include every person, company or

<sup>1</sup> This section was originally Section 17 of Act 89 S. L. 1913 and provided for "reasonable" fees, the original section is printed in Appendix, p. 47.

corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Sec. 2209 provides:

"If any section, sub-section, sentence, clause or phrase of this chapter shall for any reason be held to be invalid as to any or all matters within its terms, such decision shall not affect the validity of the remaining portions of this chapter, or the validity of such portion as to any other matter within its terms."

Sec. 2210 provides:

"This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

For convenience of the Court there is reprinted hereunder the original Section 17 of Act 89, S. L. 1913, creating the Public Utilities Commission, which related to the fees to be collected by the Commission to defray its expenses.

*Act 89 Session Laws of 1913:*

"Section 17. Finances. All salaries, wages and expenses, included traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties required or conferred by this Act, may be paid out of any appropriation available for the purpose. *The commission shall prescribe and collect reasonable costs and fees for services rendered by it*, and shall deposit the same into the treasury of the Territory to the credit of a special fund to be called the "Public Utilities Commission Fund," which is hereby created for the purpose. There shall also be paid to the commission in the months of January and July of each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-fortieth of one per cent of the aggregate par value of the stock and bonds issued by such public utility and outstanding on December 31 of the preceding year. Such fee shall likewise be deposited in the treasury to the credit of said fund. The moneys in said fund are hereby appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this Act."

(Italics ours.)

*Act 135, Session Laws of 1913 provides:*

"AN ACT

"Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto.

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The franchises granted by Act 30 of the Laws of 1903 of the Territory of Hawaii, as amended and approved by an Act of Congress approved April 21, 1904, Act 48 of the Laws of 1903 of said Territory, as amended and approved by an Act of Congress approved April 21, 1904, Act 66 of the Laws of 1905 of said Territory, as amended and approved by an Act of Congress approved June 20, 1906, Act 105 of the Laws of 1907 of said Territory, as amended and approved by an Act of Congress approved February 6, 1909, Act 130 of the Laws of 1907 of said Territory, as amended and approved by said Act of Congress, approved February 6, 1909, Act 115 of the Laws of 1909 of said Territory, as amended and approved by an Act of Congress approved June 25, 1910, and Act 66 of the Laws of 1911 of said Territory, as amended and approved by an Act of Congress approved August 1, 1912, and the persons and corporations holding said franchises, shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of Act 89 of the Laws of 1913 of said Territory creating a public utility commission and all amendments thereof for the regulation of public utilities in said Territory, and all the powers and duties expressly conferred upon or required of the Superintendent of Public Works or the courts by said acts granting said franchises are hereby conferred upon and required of said public utility commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith.

"Section 2. ( This Act shall take effect upon its approval by the Congress of the United States.

"Approved this 29th day of April, A. D. 1913.

"WALTER F. FREAR,

"Governor of the Territory of Hawaii."

*Act of Congress of March 28, 1916* (39 Stat. at L. 38, c. 53), provides:

"An Act to ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of the Territory of Hawaii, entitled 'An Act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto,' approved by the governor of the Territory April twenty-ninth, nineteen hundred and thirteen, be, and is hereby, amended, ratified, approved, and confirmed, as follows:

#### ACT 135

'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

'Be it enacted by the Legislature of the Territory of Hawaii:

'Section 1. The franchises granted by act thirty of the laws of nineteen hundred and three, of the Territory of Hawaii, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act forty-eight of the laws of nineteen hundred and three of said Territory, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act sixty-six of the laws of nineteen hundred and



five of said Territory, as amended and approved by an Act of Congress approved June twentieth, nineteen hundred and six; act one hundred and five of the laws of nineteen hundred and seven of said Territory, as amended and approved by an Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and thirty of the laws of nineteen hundred and seven of said Territory, as amended and approved by said Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and fifteen of the laws of nineteen hundred and nine of said Territory, as amended and approved by an Act of Congress approved June twenty-fifth, nineteen hundred and ten; act sixty-six of the laws of nineteen hundred and eleven of said Territory, as amended and approved by an Act of Congress approved August first, nineteen hundred and twelve; and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith; *Provided, however,* That nothing herein contained shall in

any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce: *And provided further*, That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory.

'Section 2. This act shall take effect upon its approval by the Congress of the United States.

'Approved this twenty-ninth day of April, anno Domini nineteen hundred and thirteen.

'WALTER F. FREAR,

'Governor of the Territory of Hawaii.'

'Approved, March 28, 1916.' "

*Shipping Act, 1916* (U.S.C. Title 46, Sec. 801, et seq., 39 Stat. at L. c. 451, p. 728), the references below to sections are to United States Code Annotated:

Sec. 801 provides:

"The term 'common carrier by water in foreign commerce' means a common carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: PROVIDED, That a cargo boat commonly called an ocean tramps shall not be deemed such 'common carrier by water in foreign commerce.'

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

\* \* \*

Sec. 804 provides for the creation of the United States Shipping Board and the appointment of a board of seven commissioners.

Sec. 805 fixes the salaries of the members of the board, authorizes the board to employ and fix the compensation of attorneys, officers, naval architects, special experts, examiners, clerks, and other employees.

Sec. 806 provides for the transfer of vessels belonging to the War or Navy Department to the board.

Sec. 811 authorizes the board to investigate the relative cost of building merchant vessels in the United States and in foreign countries, and report its findings to Congress.

Sec. 812 prohibits common carriers by water to enter into any understanding or agreement to pay or allow deferred rebates to any shipper or to discriminate against any shipper.

Sec. 813 provides for hearings before the board, either on its own motion or upon complaints after notice, on the question whether or not any carrier has violated any provision of Sec. 812, or entered into any agreement with anyone for deferred rebates or other unfair practices.

Sec. 814 provides that every common carrier shall file with the board all written contracts with any other person subject to the chapter, relating to the fixing or regulating of rates or fares, or controlling competition. The board is authorized to cancel or modify any contract in the event it finds the same discriminatory or unfair between carriers, shippers, exporters, importers, or if it operates to the detriment of the commerce of the United States. Violation of this section carries a pen-

alty of one thousand dollars a day and is recoverable in civil actions.

Sec. 815 prohibits carriers from giving any unreasonable preference to any person or of any particular traffic and prohibits the allowance to any person of transportation at less than established rates by means of false building or any unfair device.

Sec. 816 prohibits discrimination between shippers of the United States and foreign competitors and provides that the board, after hearing, may enter a desist order.

Sec. 817 provides:

“Every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

“Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice."

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Sec. 818 prohibits the reduction of rates for the purpose of injuring a competitive carrier.

Sec. 819 prohibits a carrier from disclosing information to any person other than the shipper or consignee of the nature, kind, destination and routing of any freight.

Sec. 820 provides for the filing of periodic reports by carriers.

Sec. 821 provides that any person may file a sworn complaint with the board, and empowers the board to direct the payment of reparation.

Sec. 822 provides that orders of the board relating to any violation of the chapter shall be made after full hearing and upon a sworn complaint or any proceedings instituted of its own motion.

Sec. 823 requires the board to make written record of every investigation and hearing and its proceedings.



Sec. 824 empowers the board to reverse or modify any order upon application after notice.

Sec. 825 empowers the board to investigate privileges afforded and burdens imposed upon vessels of the United States in foreign trade and report to the President of the United States.

Sec. 826 empowers the board to investigate alleged violations of this chapter, subpoena witnesses, compel the production of books, documents and other evidence, and compel testimony under oath.

Sec. 827 provides that no one shall be excused from testifying on the ground of self-incrimination, but grants immunity from criminal prosecution to natural persons so testifying.

Sec. 828 provides for the enforcement of any order of the board other than for the payment of money.

Sec. 829 provides for the enforcement of any order of the board for the payment of money in the District of the United States having jurisdiction, and that the findings and order of the board shall be prima facie evidence of the facts therein stated.

Sec. 830 provides that the venue and procedure in the courts of the United States in suits brought to enforce or revoke any order of the board shall be the same as in similar suits relating to the orders of the interstate commerce commission.

Sec. 831. The violation of this chapter is a misdemeanor punishable by fine not to exceed five thousand dollars.

Sec. 832. This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission.

Sec. 833 provides a separability clause in the event any one section of this chapter is held unconstitutional.

Sec. 834 empowers the Secretary of the Treasury to refuse clearance to a vessel where he finds such vessel declines to receive freight and has accommodation for the same.

Sec. 835 makes it unlawful to transfer any vessel owned by a citizen of the United States to a foreign registry.

Sec. 836 provides for proceedings upon forfeitures.

Sec. 837 provides in any forfeiture proceeding the conviction in any court of criminal jurisdiction shall be prima facie evidence in such proceedings.

Sec. 838 provides for the filing with the board of any mortgage or other transfer of any vessel.

Sec. 839 provides for the approval by the board of any act or transaction requiring such approval under this chapter.

Sec. 840 provides that any vessel registered, enrolled or licensed under the laws of the United States shall be a documented vessel within the meaning of Sec. 835.

Sec. 841 provides for the proclamation of the President that a war or emergency has ended.

Sec. 842 provides that the Act of September 7, 1916, c. 451, may be cited as "Shipping Act, 1916."

### Hawaiian Organic Act

(36 Stat. c. 258; Title 48 U. S. C. Sec. 495)

"Sec. 5. That the Constitution, and, except as otherwise provided, all the laws of the United States, includ-

ing laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory of Hawaii as elsewhere in the United States."

\* \* \* \* \*

"Sec. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. \* \* \* but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; \* \* \* " (31 Stat. 150; 48 U. S. C. 562)

Washington Statute considered in *Great Northern Ry. Co. v. Washington*, 300 U. S. 154.

Remington's Revised Statutes

Sec. 10344. Definitions. " \* \* \* The term 'common carrier,' when used in this act, includes all railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state."

\* \* \* \* \*

"The term 'public service company,' when used in this act, includes every common carrier, gas company, electrical company, water company, telephone company,

telegraph company, wharfinger and warehouseman as such terms are defined in this section."

Sec. 10417. Payment of fee. "That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under sections 10361-1 and 10361-2, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of  $1/10$  of one per cent of such gross operating revenue: Provided, That the fee so paid shall in no case be less than ten dollars."

Sec. 10418. Disposition of fees. "All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a fund to be known as the public service revolving fund,"

Washington statutes after the decision in *Great Northern Ry. Co. v. Washington*, 300 U. S. 154.

#### Remington's Revised Statutes

Sec. 10417. "Every person, firm or corporation subject to regulation by the department of public service, \* \* \* shall, \* \* \* pay to the department a fee equivalent to  $1/10$  of one per cent of the first \$50,000.00 of such gross operating revenue, plus  $2/10$  of one per cent of any such gross operating revenue in excess of \$50,000.00: *Provided*, That the fee so paid shall in no case be less than one dollar. The percentage rates of gross operating revenue to be paid in any year as herein

provided may be decreased by the department for any or each class of persons, firms and corporations subject to the payment of such fees, by general order entered before March first of such year, and for such purpose such persons, firms and corporations shall be classified as follows: Electric companies, gas companies, water companies, telephone companies, telegraph companies, steam heating companies and irrigation companies shall constitute Class One; and railroad companies, electric railroad companies, express companies, sleeping car companies and toll bridge companies shall constitute Class Two. In fixing such rates each year the department shall take into consideration all monies then on hand in the public service revolving fund and all such fees currently to be paid into said fund, to the end that the fees so collected from the several classes of such companies shall be approximately the same as the reasonable cost of supervising and regulating such classes respectively."

Sec. 10417-3. "Every steamboat company operating under the provisions of chapter 248 of the Laws of 1927 and every wharfinger or warehouseman as defined by chapter 117 of the Session Laws of 1911, shall, on or before the first day of April of 1937 and of each year thereafter, file with the department a statement on oath showing its gross operating revenue from intrastate operations for the preceding calendar year or portion thereof and pay to the department a fee of  $\frac{2}{5}$  of one per cent of the amount of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than five dollars. The percentage rate of gross operating revenue to be paid in any year as herein provided may be decreased by the department by general order entered before March first of such year. In fixing such



rate the department shall take into consideration all monies on hand in the public service revolving fund and fees currently to be paid into said fund to the end that the fees so collected from steamboat companies and wharfingers or warehousemen as a group shall be approximately the same as the reasonable cost of supervising and regulating such companies as a group."

FILE COPY

on all  
id and  
d that  
s. and  
be ap-  
super-

INTER-DEPARTMENTAL COMMITTEE

THE SECRETARY OF DEFENSE  
OFFICE OF THE SECRETARY OF DEFENSE  
WASHINGTON, D. C.

MEMORANDUM FOR THE SECRETARY OF DEFENSE

JOHN R. MCGUIRE, Captain  
Colonel for the Department

UNION PACIFIC  
HONOLULU, HAWAII  
OF COAST

# Subject Index

	PAGE
OPINIONS OF COURTS BELOW .....	1
JURISDICTION .....	2
STATEMENT .....	2
QUESTIONS PRESENTED .....	9
SUMMARY OF ARGUMENT .....	10
ARGUMENT .....	12
I. THE TERRITORIAL POWER TO INVESTIGATE AND COLLECT STATUTORY FEES FROM THE PETITIONER CANNOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE, BECAUSE THE POWER TO INVESTIGATE AND THE MEASURE OF THE FEES HAVE IN ALL RESPECTS BEEN APPROVED BY ACT OF CONGRESS .....	12
Ratification and Approval by Congress .....	15
The Approval by Congress of the Provisions of the Act is Controlling .....	19
II. THE ENACTMENT BY CONGRESS OF THE SHIPPING ACT OF 1916, DID NOT DIVEST THE LOCAL COMMISSION OF ITS POWERS OF INVESTIGATION OR ITS DUTY TO COLLECT THE FEES PROVIDED TO PERMIT SUCH INVESTIGATION .....	21
III. THE FEES ARE NOT EXCESSIVE OR UNREASONABLE AND THEIR COLLECTION DOES NOT RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW .....	24
CONCLUSION .....	28

# Table of Cases

	PAGE
Bourjois, Inc. v. Chapman, 301 U. S. 183, 187	8, 27, 28
Cincinnati Soap Co. v. U. S., 301 U. S. 308, 323	24
DeBary & Co. v. La., 227 U. S. 108	20
Foot & Co., Inc. v. Stanley, 232 U. S. 494	28
Eoppiano v. Speed, 199 U. S. 501	20
France v. Connor, 161 U. S. 65 at 72	18
Great Northern Railway Co. v. State of Washington, 300 U. S. 154, 160	8, 11, 25, 27, 28
Heiner v. Colonial Trust Co., 275 U. S. 232	20
In re Haw. Tel. Co., 26 Haw. 508	21
In Re Rahrer, 140 U. S. 545	19
Komada & Co. v. U. S., 215 U. S. 392	20
Mormon Church v. U. S., 136 U. S. 1	18
National Bank v. Yankton County, 101 U. S. 130	18
New Mexico ex rel. McLean v. Denver, etc., R. Co., 203 U. S. 38	28
New York, etc., R. Co. v. Interstate Commerce Commis- sion, 200 U. S. 361	20
New York Rapid Transit Corp. v. New York City, — U. S. —, decided March 28, 1938	24
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17	19
Panama R. R. Co. v. Johnson, 264 U. S. 375	22
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345	28
Phillips v. Mobile, 208 U. S. 472	19
Red "C" Gil Mfg. Co. v. Board of Agriculture, 222 U. S. 380	28
Re I. I. S. N. Co., 24 Haw. 136	21
St. Paul, etc. Ry. Co. v. Phelps, 137 U. S. 528	20
Talbot v. Silver Bow County Commissioners, 139 U. S. 438	24
Territory v. I. I. S. N. Co., 32 Haw. 127	6
U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 481	

# Statutes

	PAGE
Act 89, S. L. Haw. 1913, amended by Act 127, S. L.	
Haw. 1913	2, 10, 11, 16, 19, 24
Sec. 4 (Sec. 2192, R. L. H. 1925)	12
Sec. 5 (Sec. 2193, R. L. H. 1925)	13
Sec. 13 (Sec. 2201, R. L. H. 1925)	2, 13
Sec. 14 (Sec. 2202, R. L. H. 1925)	13
Sec. 17 (Sec. 2207, R. L. H. 1925)	3, 14
Sec. 18 (Sec. 2208, R. L. H. 1925)	14
Act 135, S. L. Haw. 1913	4, 16, 17, 18
Act of March 28, 1916, 39 Stat. 38, c. 53	4, 7, 9, 15, 17, 20
Act of June 19, 1934, c. 652, Sec. 602(b), 48 Stat. 1102	15
Air Commerce Act of 1926, Act of May 20, 1926, 44	
Stat. 568, U.S.C. Tit. 49, s. 171, et seq.	16
Bills of Lading Act, Act of August 29, 1916, 39 Stat.	
538, U.S.C. Tit. 49, s. 81 et seq.	16
Employees Compensation Act, Act of April 22, 1908, 35	
Stat. 65, U.S.C. Tit. 45, s. 52 et seq.	16
Federal Safety Appliance Acts (Act of Mar. 2, 1893,	
c. 196, as amended by Act of Mar. 2, 1903, c. 976,	
U.S.C. Tit. 45, s. 8 et seq.)	15
Hours of Service of Employees, Act of March 4, 1907,	
34 Stat. 1415, U.S.C. Tit. 45, s. 61 et seq.	16
Interstate Commerce Act of Feb. 28, 1920, 41 Stat. 456	15
Interstate Commerce Act of June 29, 1906, 34 Stat. 584,	
c. 3591 (U.S.C. Tit. 49, s. 1)	15
Judicial Code, Section 240(a), as amended by Act of	
Feb. 13, 1925 (28 U.S.C. Sec. 347)	2
Shipping Act of Sept. 7, 1916, c. 451, s. 1, 39 Stat. 728,	
U.S.C. Tit. 46, s. 801, et seq.	5, 11, 21
U. S. Constitution,	
Art. 1, s. 8, cl. 3	19
Art. 4, s. 3, cl. 2	19



## Index to Appendix

	PAGE
Table for Utilities Act of 1913	i
Section 13, Act 89, S. L. Haw. 1913; Section 2203, R. L. H. 1925	ii

In the Supreme Court of the  
United States

---

OCTOBER TERM, 1937

No. 94

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED,

*Petitioner,*

vs.

TERRITORY OF HAWAII, by the Public  
Utilities Commission of the Ter-  
ritory of Hawaii,

*Respondent.*

**Brief for Respondent in Opposition  
to the Petition for Certiorari**

---

OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Hawaii on questions of law reserved by the Trial Court was filed October 8, 1931 (R. 13-28), and is reported in 32 Haw. 127. The opinion of the Trial Court filed April 12, 1934, is not reported and appears at R. 45-65. The opinion of the Supreme Court of Hawaii on writ of error was filed

July 25, 1936 (R. 259-284), and is reported in 33 Haw. 896. The opinion of the Circuit Court of Appeals filed April 16, 1938 (R. 318-337), is reported in 96 F. 2d 412.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 16, 1938. The petition for a writ of certiorari was filed on June 6, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C. Sec. 347).

## STATEMENT

The following additional statement will aid in clarifying the issues raised by the Petitioner:

The Public Utilities Commission of the Territory of Hawaii (referred to herein as the "Commission") was created by and operates pursuant to the provisions of Act 89, S. L. Haw. 1913, which Act, as amended by Act 127, S. L. Haw. 1913, became effective on July 1, 1913, and is referred to herein as the "Utilities Act of 1913."\*

Section 13 of the Utilities Act of 1913 (Sec. 2201, R. L. Haw. 1925, *infra*, Appendix p. ii) provided in part:

---

\* This Act became chapter 132 of R. L. Haw. 1925. The chapter is summarized in the Petitioner's brief, Appendix i to vi, but the Petitioner has failed to quote the provisions of Section 13 of the Act (Section 2201, R. L. Haw. 1925) providing for the investigation of federally regulated utilities, which section was the basis for the four lower court decisions contrary to the Petitioner's contentions. A table showing the original sections of the Act and the corresponding sections of R. L. Haw. 1925, is contained herein in Appendix i.

"The commission shall have power to examine into any of the matters referred to in Section 2193 (Section 5 of this Act) *notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body*, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise *before the interstate commerce commission, or such court or other body*, in its own name or in the name of the Territory, . . ." (Italics ours.)

The duty is given the Commission by Section 17 of said Act, as amended by provisions of Act 127, S. L. Haw. 1913. (Sec. 2207, R. L. Haw. 1925, Pet. Br., Appendix p. iv), to collect from each utility "which is subject to investigation by the commission" semiannual fees measured by gross receipts and by the outstanding capital stock of the utility subject to investigation. These fees are required to be placed into a fund appropriated for the salaries, wages and authorized expenses of the Commission.

At the time of the creation of the Commission in 1913, and at all times thereafter, railroads operating wholly in the Territory have been subject to the regulatory jurisdiction of the Interstate Commerce Commission.\* Since 1913 Congress has from time to time provided for the regulation of various public utilities in the Terri-

---

\*The statutes relating to federally regulated utilities, other than the Petitioner are referred to in the Argument, *infra*, p. 15-16.

tory by the several Federal agencies, and in the case of telephone companies, returned the regulatory jurisdiction to the local Commission after such jurisdiction had been vested in the Interstate Commerce Commission for 14 years. No Act of Congress providing for Federal regulation of local utilities has expressly provided that the Commission should be divested of its power of investigation given by the Utilities Act of 1913, which power was ratified by Congress, as hereafter shown.

Prior to the effective date of the Utilities Act of 1913, the Territorial Legislature adopted Act 135, S. L. Haw. 1913 (reprinted Pet. Br., Appendix p. vi), to become effective upon its approval by the Congress of the United States, for the express purpose of making the Utilities Act of 1913 applicable to public utilities operating in the Territory under congressionally approved franchises and for the express purpose of having the approval of territorial investigation of federally regulated utilities.

By Act of March 28, 1916, c. 53, 39 Stat. 38 (reprinted Pet. Br., Appendix p. viii), Congress amended and ratified Act 135, S. L. Haw. 1913, and confirmed and approved the Utilities Act of 1913 by making the same applicable in all respects to "all public utilities and public-utilities companies organized or operating within the Territory of Hawaii." The Act of Congress amending and ratifying Act 135, S. L. Haw. 1913, reads in part as follows:

*"The franchises granted by (various territorial acts approved by Congress) and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating*



*within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public utilities commission and all amendments thereof for the regulation of public utilities in said Territory \* \* \* Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce \* \* \** (Italics indicate additions to Act 135, S. L. Haw. 1913, made by Congress).

By the Act of September 7, 1916, 39 Stat. 728, (U.S.C. Tit. 46, s. 301, *et seq.* summarized in Petitioner's brief, Appendix pp. xi-xvi) (hereinafter referred to as the "Shipping Act, 1916") there was created the United States Shipping Board with certain regulatory powers over carriers engaged in transportation by water of passengers or property between places in the same territory. Petitioner relies on the Shipping Act, 1916, for its position that as a matter of statutory construction the Commission has been divested entirely of its powers to investigate and collect the statutory fees.

Beginning in 1913 all public utilities operating in the Territory of Hawaii, whether or not operating under congressionally approved franchises and whether or not regulated by Federal agencies, paid to the Commission all of the fees prescribed by the Utilities Act of 1913 (R. 69, 88); and all such public utilities except the Petitioner have at all times since then continued to pay the statutory fees (R. 69). Beginning with the year 1923 the Petitioner contended that the Utilities Act of

1913 had no application to it and that the Commission was without jurisdiction to make the investigations authorized under said Act (Stip. of Counsel, R. 44).

This action was brought to compel the Petitioner to pay the statutory fees in order to provide the necessary funds to enable the Commission to carry out its powers and duties under the Utilities Act of 1913. The Supreme Court of the Territory of Hawaii in a decision rendered on reserved questions (*Territory v. I.I.S.N. Co.*, 32 Haw. 127, R. 12), held that the Shipping Act, 1916, did not divest the Commission of its power or duty to examine into and investigate the business of the Petitioner and that since the utility was subject to investigation by the Commission it was obligated to pay the statutory fees.

On the trial of the cause the Commission introduced evidence showing that all utilities (whether or not federally regulated) operating in the Territory, other than the Petitioner, paid the statutory fees (R. 69, 88); that the total fees paid to the Commission have been insufficient to pay the expenses for carrying on the work of the Commission (R. 70); that from time to time between 1913 and 1929 the Legislature of the Territory of Hawaii appropriated sums of money amounting in all to \$38,000 in order to carry on the work of the Commission (R. 70), including a specific appropriation of \$5,000, which was set apart for the purpose of paying the expense in connection with the litigation of the position taken by the Petitioner (R. 108-109); that no portion of the fees paid has ever gone into the general revenues of the Territory (R. 70). There was evidence that during 1916 and 1917, the years in which the Petitioner was paying the statutory fees, the Commission expended on account of an investigation of the Peti-

tioner an amount greatly in excess of the fees paid by the Petitioner during those years (R. 71, 124-125). It was stipulated (R. 48-49) that the Commission did not investigate the Petitioner during the period in question (during which the Petitioner insisted the Commission lacked power to investigate), and that the Petitioner made no reports to the Commission except that the auditor examined the Petitioner's books to ascertain for purposes of the litigation the statutory fees claimed (R. 48). The Petitioner rested on evidence that the reasonable value of the auditor's services in ascertaining the fees claimed to be due did not exceed \$30 (R. 103).

Evidence was introduced by Petitioner to show that, although the Petitioner is a domestic corporation whose business is entirely conducted within the territorial limits (R. 196-197) and although Petitioner has no through rates, no through bills of lading and does entirely a local business (R. 197), a portion of its freight after delivery by the Petitioner is transported to the mainland of the United States or to foreign countries and likewise a portion of the freight that it receives for transportation before delivery to the Petitioner is received in the Territory of Hawaii from foreign countries or the mainland of the United States (R. 183-198). The portion of Petitioner's gross utilities revenues attributable to such freight was computed at approximately 42% of such revenues (R. 327).

The Trial Court ruled that Congress, by the enactment of Act of March 28, 1916, expressly ratified and approved the Utilities Act of 1913, and adopted the Commission as its agency to have the powers prescribed over utilities as set out in the Act, and approved the measure of the fees as set forth in the Act (R. 57-62),

and that it was not necessary to consider the incidental effect, if any, of the exaction of the fees upon interstate and foreign commerce (R. 58); that the fees were not shown to be disproportionate to the service required of the Commission (R. 61-62).

The Supreme Court of the Territory of Hawaii found that there had been no showing that the fees prescribed to enable the Commission to perform its duties under the Act were disproportionate to the services required to be performed, and that the making of an investigation was not a condition precedent to the collection of the fees, and that if they were not unreasonable they did not burden interstate or foreign commerce (R. 261, 267).

The Circuit Court of Appeals found that Congress had expressly ratified the Act creating the Commission (R. 330); and further held that if it be assumed that the Commission had no power to investigate the Petitioner in the conduct of interstate commerce (which matter the Court stated it did *not* decide) (R. 333) still the Petitioner conducted a large purely intra-territorial business which had no relationship to interstate commerce, and that even assuming that the investigatory power of the Commission was limited to this field, the Petitioner could be required to pay the statutory fees (R. 334). The Circuit Court of Appeals further held, after giving consideration to the recently decided cases of *Great Northern Railway Co. v. State of Washington*, 300 U. S. 154, 160, and *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 187, that upon the record of past income, and expenses, there was a clear showing that the fees prescribed by the statute were not unreasonable or disproportionate (R. 336).

## QUESTIONS PRESENTED

1. Where Congress by Act of March 28, 1916, amends and ratifies a territorial statute, and thereby approves investigations by the Territorial Public Utilities Commission of all federally regulated local public utilities (including franchised railroads subject in all respects to the jurisdiction of the Interstate Commerce Commission), does a subsequent Act of Congress, making the jurisdiction of the Shipping Board applicable to intra-territorial carriers by water, divest the Territorial Public Utilities Commission of its power to investigate such carriers in the absence of a conflict between the terms of the Shipping Act and the congressionally approved territorial Act?

2. Where congressional approval is shown to the exaction of non-discriminatory utilities fees from all local utilities to the Territorial Public Utilities Commission, to be used to pay the expense of regulation of local utilities not federally regulated and the expense of investigation of local utilities which are federally regulated, is it any defense to an action for the collection of such fees that the fees are measured in part by gross receipts from freight alleged to be carried in interstate or foreign commerce?

3. Can a public utility, which refuses to permit investigation by the Territorial Public Utilities Commission of its business and affairs, and which refuses to pay the statutory fees to the Commission to enable the Commission to make such investigations, be permitted to defend an action for statutory fees on the ground that no investigations were made by the Commission during the period of the utility's refusal to pay the fees?



## SUMMARY OF ARGUMENT

The courts below found no conflict between the jurisdiction of the Shipping Board and the claimed jurisdiction of the congressionally sanctioned and approved territorial agency, the Public Utilities Commission. The Petitioner, by failing to keep clear the distinction between a state and a territory, whose powers are derived from and are in all respects dependent upon Congress, attempts to show a conflict with Supreme Court decisions and an encroachment upon the Petitioner's constitutional rights. The validity of the decisions of the courts below and the insufficiency of the petition are clearly established if the distinction between a state and a territory is borne in mind.

The territorial Utilities Act of 1913 provides that the business of all public utilities operating in the Territory of Hawaii, whether their rates and practices be regulated by the local Public Utilities Commission or by a Federal agency, shall be subject to investigation by the Commission. Where a public utility is subject to rate regulation by a Federal agency, it is made the duty of the local Commission after investigation to institute proceedings before the Interstate Commerce Commission or other body or court to correct the matters coming within the jurisdiction of such Federal agency. There is imposed upon all public utilities operating in the Territory and subject to investigation statutory fees measured by gross income and by outstanding capital stock of each utility. Under the Utilities Act of 1913 these fees must be used to defray the expenses of the Commission.

Congress, with plenary power over the affairs of the Territory, has ratified and approved the territorial legislation and by its own amendment confirmed its

application to all public utilities organized or operating within the Territory of Hawaii. The ratification by Congress of the Utilities Act of 1913 disposes of every contention that the territorial law is invalid because it constitutes a burden on interstate or foreign commerce. The Respondent submits that there is no inconsistency between the Utilities Act of 1913 as approved by Congress and the Shipping Act of 1916; that it affirmatively appears from the record that the exactions imposed by the statute are not more than sufficient and are probably insufficient in amount to enable the Commission to perform its duties with regard to the Petitioner; that the Utilities Act of 1913 is not a revenue raising measure and legislative appropriations have been necessary from time to time to enable the Commission to perform its duties; that the Petitioner has completely failed in any respect to show that the fees are known to be unreasonable or have proven to be in excess of the amount needed to pay for the inspection services required to be rendered; that the Petitioner has failed to show discrimination or arbitrary administration, and in fact seeks in this case to gain an advantage over the other utilities by illegally refusing to pay the fees necessary to enable the Commission to investigate and by refusing to comply with the Act under the claim that it is not applicable to its business; that the case is controlled by the principles announced in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, which would have to be overruled to sustain Petitioner's position; that no conflict has been shown with the decision in *Great Northern Railway Co. v. State of Washington*, 300 U. S. 154. The petition should be denied because no substantial Federal question is raised.

## I.

THE TERRITORIAL POWER TO INVESTIGATE AND COLLECT STATUTORY FEES FROM THE PETITIONER CANNOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE, BECAUSE THE POWER TO INVESTIGATE AND THE MEASURE OF THE FEES HAVE IN ALL RESPECTS BEEN APPROVED BY ACT OF CONGRESS.

Petitioner claims a constitutional immunity because certain of its freight before or after transportation by the Petitioner is carried by other carriers in interstate and foreign commerce (Pet. Br. 20, 23).

The facts are not disputed. The Petitioner is a Hawaiian corporation, doing business only within the Territory of Hawaii, with no through rates, through contracts, or trans-shipment contracts (Stip. of Counsel, R. 42, 198). All of its engagements and undertakings are completely performed in the Territory of Hawaii (R. 51-52).

The statute on its face shows that it was the legislative intention to empower the regulation and investigation of all utilities operating in the Territory to the full extent that the same would be permitted under the Constitution and the laws of the United States. The Territorial Legislature recognized that Congress with plenary power over the Territory might from time to time place the regulatory jurisdiction over any utility at any time and in any respect in some commission, body or board other than the local Commission.

By Section 4 of the Utilities Act of 1913 (Sec. 2192, Ch. 132, R. L. Haw. 1925) the Commission was given

general supervision "hereinafter set forth over all public utilities doing business in the Territory, . . ." Section 5 of the Act (Sec. 2193, Ch. 132, R. L. Haw. 1925) defines the Commission's powers of investigation and gives power "to examine into the condition of each public utility doing business in the Territory," and "its compliance with all applicable territorial and Federal laws. . . ." Section 13 of the Act (Sec. 2201, Ch. 132, R. L. Haw. 1925) provides that the Commission may make recommendations and bring suits and provides further that—

"The Commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best." (Italics ours.) (See *infra* Appendix p. ii.)

Section 14 of the Act (Sec. 2202, Ch. 132, R. L. Haw. 1925) gives the Commission jurisdiction to fix rates, fares, charges, classifications, rules and practices "insofar as it is not prevented by the constitution or laws

of the United States." Section 17 of the Act (Sec. 2207, Ch. 132, R. L. Haw. 1925) provides for the collection of fees to be paid by "each public utility which is subject to investigation by the commission." The fees were required to be paid into a special fund called the "Public Utilities Commission Fund," which fund is expressly appropriated for the payment of all salaries, wages and expenses authorized or prescribed by the Chapter. Section 18 of the Act (Sec. 2208, Ch. 132, R. L. Haw. 1925) defines the term "public utility" to "mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

The Petitioner operating solely "between points within the Territory" is expressly included within the definition in Section 18, and a conflict with the Constitution or laws of the United States must be affirmative and clearly shown if the Petitioner is to be relieved from the duties expressly imposed by the statute.



*Ratification and Approval by Congress.*

The Petitioner takes sharp issue with the holding of the Trial Court and the Circuit Court of Appeals that the congressional approval contained in the Act of March 28, 1916, 39 Stat. 38, c. 53 (Pet. Br., Appendix p. viii) had application to the Petitioner. The clear language of the Act of Congress and the circumstances under which the Act of Congress was adopted make it perfectly clear that Petitioner's contentions in this behalf are wholly without foundation and present no substantial question for consideration by this Court.

In 1913 when the Utilities Commission was created, railroads operating wholly within the Territory of Hawaii were subject in all respects to the regulatory jurisdiction of the Interstate Commerce Commission under the provisions of the Act of June 29, 1906, 34 Stat. 584, c. 3591 (U.S.C. Tit. 49, s. 1) amending the Interstate Commerce Act; and such railroads have since annexation of Hawaii been subject to the detailed regulatory provisions governing almost every field of railroad operation contained in the Federal Safety Appliance Acts, (Act of March 2, 1893, c. 196, as amended by Act of March 2, 1903, c. 976, U.S.C. Tit. 45, s. 8 et seq.). The regulation of telephone companies operating in the Territory of Hawaii was placed under the jurisdiction of the Interstate Commerce Commission by the Act of February 28, 1920, 41 Stat. 456, and remained under such jurisdiction until the enactment by Congress of the Act of June 19, 1934, c. 652, s. 602(b), 48 Stat. 1102, when jurisdiction was revested in the local Commission. Many other detailed regulatory Federal statutes have from time to time been made expressly applicable

to the utilities operated wholly within the Territory of Hawaii.\*

The close relationship between the territorial and Federal governments was given recognition in the Utilities Act of 1913 and the Commission was expressly authorized and directed to investigate among other things *the compliance of the local utilities with all applicable Federal laws* with the duty of protecting the public by either making its own orders if the matter were in its regulatory power or by bringing proper proceedings before the Interstate Commerce Commission or such court or other body as might be appropriate. The distance of Hawaii and the difficulty of individual complaint furnishes ample legislative motive for the passage of the Utilities Act of 1913 in the form in which it was enacted.

To accomplish congressional ratification of the application of the Utilities Act of 1913 to utilities operating under franchises approved by Congress and utilities federally regulated, the 1913 Territorial Legislature enacted Act 135, S. L. Haw. 1913 (reprinted Pet. Br., Appendix p. vi) to become effective upon its approval by the Congress of the United States. It should be noted, as was pointed out by the Trial Court, that in Act 135, S. L. Haw. 1913, all franchises which had theretofore been approved by Congress are specifically

---

\* As examples: Bills of Lading Act, Act of August 29, 1916, 39 Stat. 538, U.S.C. Tit. 49, Sec. 81 et seq.; Employees Compensation Act, Act of April 22, 1908, 35 Stat. 65, U.S.C. Tit. 45, Sec. 52 et seq.; Hours of Service of Employees, Act of March 4, 1907, 34 Stat. 1415, U.S.C. Tit. 45, Sec. 61 et seq.; Air Commerce Act of 1926; Act of May 20, 1926, 44 Stat. 568, U.S.C. Tit. 49, Sec. 171 et seq.

mentioned and referred to by Act number and approval date (R. 64). In 1916, when Congress had before it for consideration, ratification and approval of Act 135, S. L. Haw. 1913, Congress amended the Act by inserting additional provisions in Act 135, S. L. Haw. 1913, extending the scope thereof *to include and cover all public utilities organized or operating within the Territory of Hawaii*. By the Act of March 28, 1916, 39 Stat. 38, c. 53 (reprinted Pet. Br., Appendix p. viii) Congress amended Act 135 by adding the language which is italicized hereunder so that said Act of Congress reads in part as follows:

*"... and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory;..."* (Italics ours.)

Congress also added the following proviso to Act 135, S. L. Haw. 1913:

*"Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."*

The power of Congress in the exercise of its constitutional powers to amend and extend the provisions of

Act 135, S. L. Haw. 1913, and to confirm the applicability of the Public Utilities Act of 1913, has never been denied or doubted. *France v. Connor*, 161 U. S. 65, at 72; *Mormon Church v. U. S.*, 136 U. S. 1; *National Bank v. Yankton County*, 101 U. S. 129.

The Petitioner urges that under "the fundamental rule of *noscitur a sociis*," the Act of Congress has application only to franchised corporations (Pet. Br. 34).

The mere reading of the statute would demonstrate that the decision of the Trial Court on this matter (R. 64), quoted hereunder is unassailable:

"Where language in an act is plain and unambiguous it needs no construction: In re the suggested application of the doctrine '*noscitur a sociis*' argued by counsel, the court calls attention to the following cases raising other principles of construction. The act of Congress under construction as well as the original act of the legislature of Hawaii (135, L. 1913) recited all the territorial legislature franchise acts then in existence, see R. L. 1925 Vol. II, p. 1980 et seq. The general language then following in the act of Congress which was added by Congress, would have no meaning if confined to term 'franchise.' The obvious, express class is, 'all public utilities operating in the Territory.' This is plain and all conclusive. It needs no 'construction'; nor can the title restrict the plain language thereof.

"See *U.S. v. Fisher*, 2 Cranch 358, 385-397 (Marshall, Ch. J.); 2 L. ed. 304, 313-317. *Pennock v. Dialogue*, 2 Peters 1, 7 L. ed. 327. *Yerke v. U. S.*, 173 U. S. 439, 43 L. ed. 760. *Texas v. Chiles*, 21 Wall. 488, 22 L. ed. 650. *Boudinot v. U. S.*, 11 Wall.

616, 20 L. ed. 227. *Lewis v. U. S.*, 92 U. S. 618, 23 L. ed. 513. *U. S. v. Ewing*, 184 U. S. 140, 46 L. ed. 471. *American Express Co. v. U. S.*, 212 U. S. 522, 53 L. ed. 635. *Caminetti v. U. S.*, 242 U. S. 470, 61 L. ed. 442. *Commissioner v. Gottlieb*, 265 U. S. 310, 68 L. ed. 1031." (*Decision, Trial Ct., R. 64.*)

*The Approval by Congress of the  
Provisions of the Act is Controlling*

When Congress approves the exaction of fees by confirming the applicability of the Utilities Act of 1913 in all respects to all utilities operating in the Territory, all discussions of "burdens upon interstate or foreign commerce" are made superfluous. The Court may take judicial knowledge of the fact that virtually all carriers for hire in the Territory of Hawaii carry materials which are either received after trans-shipment or are to be trans-shipped into interstate or foreign commerce. The investigation fees are based in part on gross receipts from the utility business within the Territory of Hawaii. There can be no question but that Congress is acting constitutionally when it directs the exaction of fees measured by gross utility income because Congress has plenary power over interstate and foreign commerce (U. S. Constitution, Art. 1, s. 8, cl. 3) and also has plenary power over the Territory (U. S. Constitution, Art. 4, s. 3, cl. 2).

The constitutionality of the congressional assent to state regulation of interstate and foreign commerce and the validity of such regulation after congressional assent has been firmly established.

*In Re Rahrer*, 140 U. S. 545;

*Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17;

*Phillips v. Mobile*, 208 U. S. 472;



*DeBary & Co. v. La.*, 227 U. S. 108 (foreign commerce);

*Foppiano v. Speed*, 199 U. S. 501.

If a state may with congressional assent tax or regulate interstate commerce, a territory clearly may with such assent exact non-discriminatory public utilities fees.

At the time of the adoption of the Act of March 28, 1916, there was already a settled administrative construction by the Commission of the provisions of the Utilities Act of 1913. The Commission had collected from, and all utilities operating within the Territory (including the Petitioner) had paid and continued to pay all of the fees prescribed by the Utilities Act of 1913 regardless of the nature of the freights carried, and regardless of the fact that the regulatory power over some utilities had been vested in a Federal agency (R. 69, Ex. A; R. 88, 92).

If there were any question as to the congressional intention, the settled prior administrative construction of the Utilities Act would be determinative of the proper construction to be put on the Act as it was approved by Congress.

*New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361;

*Komada & Co. v. U. S.*, 215 U. S. 392;

*St. Paul, etc., Ry. Co. v. Phelps*, 137 U. S. 528;

*Heiner v. Colonial Trust Co.*, 275 U. S. 232.

## II.

THE ENACTMENT BY CONGRESS OF THE SHIPPING ACT OF 1916, DID NOT DIVEST THE LOCAL COMMISSION OF ITS POWERS OF INVESTIGATION OR ITS DUTY TO COLLECT THE FEES PROVIDED TO PERMIT SUCH INVESTIGATION.

The Territorial Supreme Court in 1917 held that the Commission was without power after the enactment of the Shipping Act of 1916 to regulate the rates, practices, tariffs, routes or business of the Petitioner. *Re I. I. S. N. Co.*, 24 Haw. 136. The Territorial Supreme Court likewise held in 1922, *In re Haw. Tel. Co.*, 26 Haw. 508, that the Commission was without power to regulate the rates or charges of telephone companies operating wholly within the Territory during the time that regulatory power over such companies was vested in the Interstate Commerce Commission. The validity of these decisions, for the purposes of this case, may be assumed and is not involved in these proceedings.

It was on the basis of these decisions that the Petitioner resisted the payment of all fees after the year 1923, and contended that *all powers* of the Commission with regard to the business of the Petitioner "in any respect or for any purpose" had been taken from the Commission (R. 8). The Petitioner's contentions in this regard were the subject of the reserved questions of law certified to the Supreme Court in the present proceedings in 1930 (R. 9). The Supreme Court in a clear and unassailable opinion (R. 13) held that the Shipping Act did not repeal by implication or otherwise the provisions of the Utilities Act of 1913 author-

izing the Commission to investigate all public utilities doing business in the Territory and to institute and prosecute appropriate proceedings before the Interstate Commerce Commission or the Shipping Board in appropriate cases. The Court states in this regard:

"And if it is authorized, as it is by Act 89, to make an investigation which is complete and effective,—solely for the purpose of placing the facts before the body authorized to regulate—can this power or its exercise be held to be in conflict with the power of the shipping board to regulate or with the intent of Congress that the shipping board alone should regulate? We think not. In our opinion the power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom it may see fit to regulate. Under these circumstances, there can be no repeal by implication." (Op. of Sup. Ct., R. 24-25.)

The issue raised in the petition does not concern an encroachment of the Territory into a field exclusively within the power of Congress. The case involves two Acts of Congress which are perfectly harmonious. When Congress approved the Utilities Act of 1913 by its Act of March 28, 1916, it was contemplated that Federal statutes might from time to time extend Federal control to other utilities in the Territory. The enactment of the Shipping Act of September 7, 1916, is clearly consistent with the general plan for territorial supervision approved by Congress earlier in the year and does not repeal or withdraw that approval. *Panama R. R. Co. v. Johnson*, 264 U. S. 375.

The Petitioner concedes and it is well settled that under the principles announced in the *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, the Shipping Act, 1916, and the Interstate Commerce Act should be given a like interpretation, application and effect (Pet. Br. 29). The application and effect of the Interstate Commerce Act in connection with the territorial powers of investigation have already had the attention of Congress and it can be shown almost to a mathematical certainty that it was the congressional intention not to preclude territorial investigations in the field covered by the Interstate Commerce Act. When the Act of March 28, 1916, which in its title and text referred to local railroads specifically, came before Congress for approval Congress added the proviso as follows:

*"Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."*

If the provisions of the Utilities Act of 1913 giving the Commission power to examine railroads and collect fees, were precluded by the Interstate Commerce Commission's occupancy of the field, the ratification by Congress and the proviso added would be wholly meaningless. If Congress did not intend to preclude territorial investigation of local railways because they were federally regulated by the Interstate Commerce Commission, it is clear that Congress by enacting the much less comprehensive Shipping Act of 1916 did not intend to preclude investigation of carriers subject to that Act. *U. S. Nav. Co. v. Cunard S. S. Co. (supra)*. Therefore the Petitioner is seeking to obtain an interpretation of the Shipping Act of 1916 different from the interpretation and effect given by Congress itself to the

Interstate Commerce Act. For the Petitioner to succeed would necessarily involve the overruling by this Court of the principles announced in the *U. S. Nav. Co. v. Cunard S. S. Co.* (*supra*) decision.

### III.

**THE FEES ARE NOT EXCESSIVE OR UNREASONABLE AND THEIR COLLECTION DOES NOT RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.**

The Petitioner seeks a determination that the fees sought to be collected are unreasonable and excessive (Pet. Br. p. 15), notwithstanding the findings of the courts below and the clear record to the contrary (R. 277-282; 335-336).

If the application of the Utilities Act of 1913 to the Petitioner was approved by Congress, then the question of the reasonableness of the amount of fees to be paid can in no way be an issue. The Congress of the United States may constitutionally empower the Territory to lay a non-discriminatory public utilities tax on all public utilities operating in the Territory, and the classification of taxpayers and the amount of tax is a matter for legislative determination.

*New York Rapid Transit Corp. v. New York City*,

— U. S. —, decided March 28, 1938;

*Cincinnati Soap Co. v. U. S.*, 301 U. S. 308, 323;

*Talbot v. Silver Bow County Commissioners*, 139 U. S. 438.



Upon the state of the record, the Petitioner, it is submitted, is in no position to raise any question as to the amount of fees. The Petitioner's theory, consistently maintained throughout the trial, and the appeal to the Territorial Supreme Court, was, that the recovery of fees could only be had upon the same theory as the recovery for services rendered at the request of the Petitioner under a *quantum meruit* count (R. 89, 100, 102, 116, 126-127, 128, 131, 278). No attempt was made by the Petitioner to show that the fees sought to be collected were known to be in an unnecessarily large amount (R. 131). No evidence was offered, nor was there any contention (R. 89, 94) that the fees would be in excess of what would reasonably be required to make the required investigations. The Petitioner persistently objected to the introduction of evidence as to what it had cost to make an investigation of Petitioner in prior years (R. 116, 123, 127), or as to what it might cost to presently investigate the Petitioner to determine the reasonableness of its rates (R. 128).

In one breath the Petitioner says the Commission is without power to investigate and hence to collect the fees; and in the next breath it says that ~~the~~ Commission cannot constitutionally collect the fees without first performing the services required by making an investigation of its business. It does not lie in the mouth of the Petitioner to refuse to pay fees and so prevent the Commission from investigating and then say that it is not obligated to pay the fees because the Commission has not done what the Petitioner said it could not do.

Respondent submits in any event that a comparison of the case at bar with the recent case of *Great Northern Railway Co. v. State of Washington*, (*supra*), will

show the conclusion reached in that case in all respects is consistent with and supports the judgment entered herein.

In the case at bar the Petitioner, after paying fees for the years 1913-1922 inclusive (R. 69), paid no fees for the years 1923-1930, claiming no liability to do so. From the year 1913 to and including the year 1929 the Territorial Legislature from time to time made appropriations to permit the Commission to carry out its functions (R. 70, 107, 108, 109); and in fact it was necessary for the Legislature to appropriate \$5,000 in 1929 for the very purpose of paying for legal services in connection with the immediate matter in litigation (R. 108). The record further shows that in 1921 and 1922, as well as in the subsequent years, the Commission never had on hand more than a very insignificant balance (R. 70) and there is clearly no evidence which would support a finding that the statute is in truth a revenue raising measure. The record further shows that in the years during which the Petitioner was paying its required fees the Commission had undertaken a comprehensive investigation of the Petitioner's rates and charges and that during the years 1916 and 1917 while such investigations were being made, the Commission incurred direct expenses in the amount of \$7,239.58 (R. 125) and incurred indirect expenses attributable to the Petitioner in the amount of \$5,385.20 (R. 125) or a total for the two years of \$12,624.78. (See Analysis of Disbursements, Ex. C, R. 71). In the same two years the Petitioner paid to the Commission total fees of \$5,063 (R. 69).

It further appears that no rate base has ever been established for the Petitioner (R. 133) and that upon objection of the Petitioner the Trial Court refused to ad-

mit evidence as to what an investigation of the business of the Petitioner would cost *because on the theory of the Petitioner* such evidence was not material (R. 192). The payment of \$33,724 in fees for a period of eight years, during which Petitioner grossed \$18,214,139 (R. 74), does not show any obvious excessiveness or unreasonableness. The most that can be said for the Petitioner's contention is that despite the experience of the Commission to the contrary, if the Petitioner pays the fees it might pay more than will be required to investigate it. That this is insufficient under the *Great Northern Railway Co. case (supra)* decision to establish the invalidity of the statute is authoritatively shown by the later unanimous decision of the Supreme Court in *Bourjois, Inc. v. Chapman*, 301 U. S. 183, which disposes completely of the Petitioner's present contention. The Court said in passing on the validity of an inspection fee sought to be collected in advance of inspections, at page 187,

"It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirement, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face. The mere fact that the fees imposed might exceed the cost of inspection is immaterial."

The legal position of the Petitioner is in no way similar to the position of the railroads in the *Great Northern Railway Co. case (supra)*. The ratification by Congress of the local utilities statute disposes of any complaint that the fees burden interstate or foreign commerce, or are attributable to business over which the Territory has no control. But even without congressional sanction, before there can be a declaration

of unconstitutionality of the fee statute on the ground of excessiveness, it must be shown as a fact that "what was known to be an unnecessary amount has been levied, or what has proved to be an unreasonable charge is continued."

*Footte & Co., Inc. v. Stanley*, 232 U. S. 494;  
*New Mexico ex rel. McLean v. Denver, etc. R. Co.*,  
 203 U. S. 38;  
*Reid "C" Oil Mfg. Co. v. Board of Agriculture*, 222  
 U. S. 380;  
*Patapsco Guano Co. v. Board of Agriculture*, 171  
 U. S. 345;  
*Great Northern Railway Co. v. State of Washing-*  
*ton (supra)*;  
*Bourjois, Inc. v. Chapman (supra)*.

The Petitioner has wholly failed to make this showing and its petition raises no constitutional question requiring the consideration of this Court.

### CONCLUSION

The unanimous decisions of the courts below were correct and accord with the decisions of this Court, and the reasons advanced in the petition herein lack the merit required by Rule 38, and therefore the petition should be denied.

Dated: Honolulu, T. H., July 2, 1938.

Respectfully submitted,

JULIUS RUSSELL CADES,  
*Counsel for the Respondent.*

URBAN EARL WILD,  
*Of Counsel.*

## APPENDIX





## APPENDIX

### *Utilities Act of 1913*

This statute was originally Act 89 of the Session Laws of Hawaii 1913, as amended by Act 127 of the Session Laws of Hawaii 1913, and took effect on July 1, 1913. This Act together with certain amendments which are not material to the case at bar became Chapter 132 of the Revised Laws of Hawaii 1925. The chapter is summarized in Petitioner's Brief, Appendix pages i-vi.

For the convenience of the Court there is shown hereunder the original sections of said Act 89, Sessions Laws of Hawaii 1913, and the corresponding sections in which they subsequently appear in the Revised Laws of Hawaii 1925.

*Act 89, S.L. Haw. 1913      Revised Laws of Hawaii 1925*

Section 1.....	Section 2189
2.....	2190
3.....	2191
4.....	2192
5.....	2193
6.....	2194
7.....	2195
8.....	2196
9.....	2197
10.....	2198
11.....	2199
12.....	2200
13.....	2201
14.....	2202
15.....	2205

*Act 89, S.L. Haw. 1913      Revised Laws of Hawaii 1925*

16.....	2206
17.....	2207
18.....	2208
19.....	2209
20.....	2210

Section 13, Act 89, S. L. Haw. 1913; Section 2201, R. L. H. 1925, provides:

*"Sec. 2201. May make recommendations and bring suits.* If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions, or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its

duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best."





**FILE COPY**

Office - Supreme Court, U. S.

FILED

NOV 10 1938

CHARLES ELMORE GROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

\_\_\_\_\_  
No. 94.  
\_\_\_\_\_

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
*Petitioner,*

v.

TERRITORY OF HAWAII, by Public Utilities Commission  
of the Territory of Hawaii, *Respondent.*

\_\_\_\_\_  
**BRIEF FOR RESPONDENT.**  
\_\_\_\_\_

JULIUS RUSSELL CADES,  
*Counsel for Respondent.*

URBAN EARL WILD,  
Honolulu, Hawaii,  
*Of Counsel.*



## SUBJECT INDEX.

	Page
OPINIONS OF COURTS BELOW .....	1
JURISDICTION .....	2
STATEMENT .....	2
The Federal and Territorial Statutes Involved....	2
The Facts .....	7
QUESTIONS PRESENTED .....	12
SUMMARY OF ARGUMENT .....	13.
ARGUMENT .....	14
I. The Utilities Act of 1913 Providing for the In- vestigation of Federally Regulated Utilities is Clearly Applicable to Petitioner .....	14
II. Congress has Ratified and Approved the Inves- tigation of Federally Regulated Local Utilities and the Collection of Statutory Fees to Permit Such Investigations .....	18
The Legislative Background Resulting in Con- gressional Amendment and Ratification Makes the Matter Clear .....	21
III. The Exaction of Territorial Utility Fees Ap- proved by Congress Cannot Impose a Burden on Interstate and Foreign Commerce.....	26
IV. The Enactment by Congress of the Shipping Act of 1916, Did Not Divest the Local Commission of its Powers of Investigation or its Duty to Collect the Fees Provided to Permit Such In- vestigation .....	28
(a) The Shipping Act should be Given Like Interpretation, Application and Effect as the Interstate Commerce Act .....	31
(b) Analogous Statutes have been Enacted in Other Jurisdictions .....	33

	Page
V. The Fees are Not Excessive or Unreasonable and their Collection does not Violate any of Petitioner's Constitutional Rights .....	34
(a) Petitioner is estopped to claim that the fees are excessive in this proceeding....	35
(b) The judgment entered herein is consistent with the principles announced in Great Northern Railway Co. v. Washington .....	37
CONCLUSION .....	45
APPENDIX .....	47

### TABLE OF CASES.

Adams Express Co. v. Charlottesville Woolen Mills, 109 Va. 1 .....	31
Alabama Power Co., In re, P. U. R. 1932 E. 323, 328-330 [Alabama Pub. Serv. Comm. 1932] .....	35
Bourjois, Inc., v. Chapman, 301 U. S. 183 .....	12, 43
Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386 .....	38
Chicago & N. W. R. R. v. Fuller, 17 Wall. 560 .....	31
Cincinnati Soap Co. v. U. S., 301 U. S. 308 .....	39
Clyde Mallory Lines v. Alabama, 296 U. S. 261 .....	28
Cornell Steamboat Co. v. Sohmer, 235 U. S. 549 .....	38
De Bary & Co. v. La., 227 U. S. 108 .....	27
Douglass v. Arizona Edison Co., 1 P. U. R. (N. S.) 493, 498 [Ariz. Corp. Comm. 1933] .....	35
Foote & Co., Inc., v. Stanley, 232 U. S. 494 .....	39
Foppiano v. Speed, 199 U. S. 501 .....	27
France v. Connor, 161 U. S. 65 .....	24
Galveston Ry. Co. v. Texas, 201 U. S. 217 .....	38
Great Northern Ry. Co. v. State of Washington, 300 U. S. 154 .....	11-12, 14, 37, 39
Hale v. Henkel, 201 U. S. 43 .....	31
Hawaiian Telephone Co., In re, 26 Haw. 508 .....	4, 29
Heiner v. Colonial Trust Co., 275 U. S. 232 .....	28
Inter-Island S. N. Co., In re, 24 Haw. 136 .....	4, 8, 17, 29, 42
Kelly v. Washington, 302 U. S. 1 .....	28
Komada & Co. v. U. S., 215 U. S. 392 .....	28
Mormon Church v. U. S., 136 U. S. 1 .....	24
Mountain Timber Co. v. Washington, 243 U. S. 219 .....	38

	Page
National Bank v. Yankton County, 101 U. S. 129.....	24
N. Y., etc., R. Co. v. Interstate Commerce Co., 200 U. S. 361 .....	28
N. Y. Rapid Transit Corp. v. N. Y. C., 304 U. S. 573..	39, 44
New Mexico ex rel. McLean v. Denver, etc., R. Co., 203 U. S. 38 .....	40
Noble State Bank v. Haskell, 219 U. S. 104.....	38
Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957, 980..	31, 34
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.....	27
Panama R. R. Co. v. Johnson, 264 U. S. 375.....	30
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345 .....	40
Penn. R. Co. v. Knight, 192 U. S. 21.....	38
People v. Central Fortuna, 22 Porto Rico Rep. 100..	26, 38
People ex rel. N. Y. Elec. Lines Co. v. Squire, 145 U. S. 175 .....	38
Phillips v. Mobile, 208 U. S. 472 .....	27
Ponce Lighter Co. v. Mun. of Ponce, 19 Porto Rico Rep. 725 .....	38
Rahrer, In re, 140 U. S. 545 .....	27
Railroad Commission Cases, 116 U. S. 307.....	31
Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380 .....	40
St. Paul, etc., Ry. Co. v. Phelps, 137 U. S. 528.....	28
Talbott v. Silver Bow County Comm., 139 U. S. 438..	39
Territory v. Inter-Island S. N. Co., 32 Haw. 127.....	4, 7
Territory v. Inter-Island S. N. Co., 33 Haw. 890.....	4, 8
Texas Co. v. Brown, 258 U. S. 466.....	38
U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 481, 14 31, 33	

## MISCELLANEOUS.

Cong. Rec., 64th Congress, 1st Session, Vol. 53, Part 2, p. 1264 .....	26
H. R. 65, 64th Congress, 1st Session .....	25
H. Report 43, 64th Congress, 1st Session, p. 2.....	25
36 Mich. L. Rev. 163 .....	44
Mosher & Crawford, Public Utility Regulations (1933) 67-81 .....	61
4 U. of Chicago L. Rev. 505 .....	44
85 U. of Pa. L. Rev. 639 .....	44
46 Yale L. Journal 1251 .....	35, 44



## STATUTES.

	Page
Act 135, S. L. Haw. 1913 .....	5, 6, 22, 23, 56
Act 89, S. L. Haw. 1913, amended by Act 127, S. L. Haw. 1913 (Ch. 132, R. L. H. 1925) (UTILITIES ACT OF 1913) .....	2, 14, 16, 24, 30, 45, 47
Sec. 5 (Sec. 2193 R. L. H. 1925) .....	2, 48
6 (Sec. 2194 R. L. H. 1925) .....	2, 49
7 (Sec. 2195 R. L. H. 1925) .....	2, 49
13 (Sec. 2201 R. L. H. 1925) .....	2, 3, 42, 51
14 (Sec. 2202 R. L. H. 1925) .....	4, 52
17 (Sec. 2207 R. L. H. 1925) .....	4, 53
18 (Sec. 2208 R. L. H. 1925) .....	17, 54
20 (Sec. 2210 R. L. H. 1925) .....	4, 16, 17, 55
Act of April 30, 1900, c. 339, s. 55 (31 Stat. 150) (U. S. C. Tit. 48, Sec. 562) (HAWAIIAN ORGANIC ACT) .....	5
<i>idem</i> , s. 6 (31 Stat. 13) .....	5, 24
Act of Feb. 28, 1920 (41 Stat. 456) .....	21
Act of June 19, 1934, c. 652, s. 602 (b), (48 Stat. 1102) ..	21
Act of March 28, 1916 (39 Stat. 38, c. 53) .....	6, 18, 21, 23, 27, 30, 32, 58
Air Commerce Act, Act of May 20, 1926, (44 Stat. 568) (U. S. C. Tit. 49, s. 171 <i>et seq.</i> ) .....	22
Bills of Lading Act, Act of August 29, 1916, (39 Stat. 538) (U. S. C. Tit. 49, s. 81 <i>et seq.</i> ) .....	22
Employees Compensation Act, Act of April 22, 1908, (35 Stat. 65) (U. S. C. Tit. 45, s. 52 <i>et seq.</i> ) .....	22
Federal Safety Appliance Acts (Act of Mar. 2, 1893, c. 196) (27 Stat. 531)—(Act of March 2, 1903, c. 976) (32 Stat. 943) (U. S. C. Tit. 45, s. 8 <i>et seq.</i> ) .....	21
Hours of Service of Employees Act, Act of March 4, 1907, (34 Stat. 1415) (U. S. C. Tit. 45, s. 61 <i>et seq.</i> ) ..	22
Interstate Commerce Act of Feb. 28, 1920, 41 Stat. 456.	21
Interstate Commerce Act of June 29, 1906, 34 Stat. 584, c. 3591 (U. S. C. Tit. 49, s. 1) .....	21
Judicial Code, Sec. 240 (a) as amended by Act of Feb. 13, 1925, 28 U. S. C. Sec. 347 .....	2
Shipping Act of Sept. 7, 1916, c. 451, 39 Stat. 728, (U. S. C. Tit. 46, s. 801 <i>et seq.</i> ) .....	6, 28-33
U. S. Constitution,	
Art. 1, sec. 8, cl. 3 .....	26-27
Art. 4, sec. 3, cl. 2 .....	27

# Index Continued.

v

## INDEX TO APPENDIX

	Page
APPENDIX A	
Utilities Act of 1913 .....	47
APPENDIX B	
Act 135, Session Laws of (Haw.) 1913 .....	56
APPENDIX C	
Act of Congress of March 28, 1916 (39 Stat. at L. 38, c. 53) .....	58
APPENDIX D	
Investigation Statutes of various States .....	61
Alabama: Code, 1928, Sec. 9669 .....	61
Arkansas: Crawford & Moses, Dig. of Stats. of Arkansas, 1921. Sec. 1630 .....	61
Arizona: Struckmeyer, Revised Code, Arizona, 1928, Sec. 691 .....	62
California: Hyatt, part two, Henning's General Laws of Calif. 1920. Sec. 34 .....	62
Georgia: II Park's Ann. Code, Ga. 1914 .....	63
Secs. 2645, 2646 and 2647 .....	63
Iowa: Code, 1927. Secs. 7890-91 .....	63
Kansas: Revised Stat. of Kan. Ann., 1923. Sec. 66- 148 .....	64
Maryland: 1 Ann. Code—Bagby, p. 835, Art. 23, Sec. 384 .....	65
Minnesota: General Statutes, 1923 .....	65
Secs. 4719, 4720, 4721 and 4660 .....	65-66
Missouri: Rev. Statutes of Missouri, 1909, Vol. I, p. 1178. Sec. 3253 .....	66
New York: Cons. Laws of N. Y.—Cahill, 1930, Ch. 49, p. 1278. Sec. 59 .....	67
North Carolina: Cons. Stat. Ann., 1919, p. 464. Sec. 1075 .....	68
New Hampshire: Public Laws, 1926, Vol. II, p. 923. Secs. 22-23 .....	68
Oregon: 2 Olson, Genl. Laws of 1920, p. 2374. Sec. 5872 .....	69
Pennsylvania: West., 1920, p. 1750. Sec. 18135 ..	70
South Dakota: Compiled Laws, 1929, Vol. II, p. 3264. Secs. 9577, 9578 .....	70-71
Wisconsin: 1 Wis. Stat. Sec. 1797-21 p. 1536 .....	71



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

---

No. 94.

---

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,  
*Petitioner,*

v.

TERRITORY OF HAWAII, by Public Utilities Commission  
of the Territory of Hawaii, *Respondent.*

---

**BRIEF FOR RESPONDENT.**

---

**OPINIONS OF COURTS BELOW.**

The opinion of the Supreme Court of Hawaii on questions of law reserved by the Trial Court was filed October 8, 1931 (R. 13), and is reported in 32 Haw. 127. The opinion of the Trial Court filed April 12, 1934, is not reported and appears at R. 45. The opinion of the Supreme Court of Hawaii on writ of error was filed July 25, 1936 (R. 259), and is reported in 33 Haw. 890. The opinion of the Circuit Court of Appeals filed April 16, 1938 (R. 318), is reported in 96 F. (2d) 412.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 16, 1938. The petition for a writ of certiorari was filed on June 6, 1938, and granted on October 10, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347).

## STATEMENT.

The following additional statement will be of assistance in clarifying the issues on certiorari:

### The Federal and Territorial Statutes Involved.

The Public Utilities Commission of the Territory of Hawaii (hereinafter sometimes called the "Commission") was created by and operates pursuant to the provisions of Act 89 S. L. Haw. 1913, which Act, as amended by Act 127, S. L. Haw. 1913, became effective on July 1, 1913, and is referred to herein as the "Utilities Act of 1913."

The Commission is authorized by Sections 5, 6, 7 and 13 (Sections 2193, 2194, 2195 and 2201, R. L. Haw. 1925; see *infra* Appendix) to investigate all public utilities doing business in the Territory of Hawaii in the following matters:

(a) The manner in which it is operating with reference to safety and accommodation of the public.

---

<sup>1</sup> This Act became Chapter 132 of the Revised Laws Hawaii, 1925, referred to herein as "R.L.Haw. 1925." The Chapter is summarized in petitioner's brief, Appendix 41 to 46. A table showing the original sections of the Act and the corresponding sections of R.L.Haw. 1925 is contained herein in Appendix 47.

All of the pertinent sections relating to the Commission's power of investigation and its duty to collect statutory fees are reproduced herein in Appendix pp. 48 to 55.



(b) The safety, working hours and wages of its employees.

(c) The reasonableness of the rates and fares charged by it.

(d) The value of its physical property.

(e) The issuance of its stocks and bonds and the disposition of the proceeds thereof.

(f) The amount and disposition of its income and all of its financial transactions.

(g) Its business relations with other persons, companies or corporations.

(h) Its compliance with all applicable territorial and federal laws.

(i) Its compliance with the provisions of its franchise, charter and articles of association.

(j) Its classifications, rules, regulations, practices and service.

(k) "All matters of every nature affecting the relations and transactions between it and the public, or persons, or corporations."

(l) The causes of any accident resulting in loss of life and any other accidents which, in the opinion of the Commission, require investigation.

Section 13 of the Act (Section 2201 R. L. Haw. 1925; see *infra* Appendix) provides that the Commission shall examine all of the matters mentioned hereinabove in paragraphs (a) to (k) inclusive "*notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body*, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise *before the interstate commerce commission, or such*

court or other body, in its own name or in the name of the Territory, . . . ."

Section 14 of the Act (Section 2202 R. L. Haw. 1925; see *infra* Appendix) provides that all rates and fares observed by any public utility must be "just and reasonable" and the Commission shall have power "insofar as it is not prevented by the Constitution or laws of the United States" to regulate, fix and change all rates, fares and charges by order.<sup>2</sup>

Section 20 of the Act (Sec. 2210 R. L. Haw. 1925; see *infra* Appendix) provides that the Act "shall not apply to commerce with foreign nations, or commerce with the several states of the United States, *except insofar as the same may be permitted under the Constitution and laws of the United States* . . . ."

The duty is given the Commission by Section 17 of the Utilities Act of 1913, as amended by the provisions of Act 127 S. L. Haw. 1913 (Sec. 2207 R. L. Haw. 1925, see *infra* Appendix) to collect from each utility *which is subject to investigation by the Commission* semi-annually, fees equal to one-twentieth of one per cent of the gross receipts from its public utility business and also a fee of one-fiftieth of one per cent of the par value

<sup>1</sup> Unless otherwise noted, throughout this brief, the emphasis has been supplied.

<sup>2</sup> The Supreme Court of Hawaii has ruled that where the rates, fares and charges of a local utility are regulated by the Interstate Commerce Commission, the Shipping Board or other Federal agency, this divests the Commission of its power to issue *regulatory orders covering the same matters*, and the Commission is limited in its duty to investigating and supervising the federally regulated utility, and bringing appropriate action where necessary before the Federal agency. *In re Inter-Island S. N. Co.*, 24 Haw. 136; *In re Hawaiian Telephone Co.*, 26 Haw. 508; *Territory v. Inter-Island S. N. Co.*, 32 Haw. 127; *Territory v. Inter-Island S. N. Co.*, 33 Haw. 890.

The respondent does not challenge the validity of this ruling in these proceedings.

of its capital stock outstanding. The fees are to be paid into the Public Utilities Commission fund which fund is appropriated for the payment of all salaries, wages and expenses authorized or prescribed by the Utilities Act of 1913.

Legislative power of the Territory of Hawaii is granted to the Territorial legislature by Act of Congress of April 30, 1900 c. 339 s. 55 (31 Stat. 150) (U. S. C. Tit. 48, Sec. 562) known as the Hawaiian Organic Act; and all Territorial laws under Section 6 of the Hawaiian Organic Act are subject to repeal or amendment by the Congress of the United States. All public utility franchises granted by the territorial legislature require the approval of Congress to be effective under the provisions of Section 55 of the Hawaiian Organic Act, which section reads in part as follows:

“The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable . . . but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . .” (Sec. 55, Hawaiian Organic Act)

Prior to the effective date of the Utilities Act of 1913, the Territorial Legislature adopted Act 135, S. L. Haw. 1913 (reprinted *infra* Appendix p. 56), to become effective upon its approval by the Congress of the United States, for the express purpose of making the Utilities Act of 1913 applicable to public utilities operating in the Territory under congressionally approved franchises, and (as will be shown hereafter) for the express purpose of having the approval of territorial investigation of federally regulated utilities.

By Act of March 28, 1916, c. 53, 39 Stat. 38 (reprinted *infra* Appendix p. 58); Congress amended and ratified Act 135, S. L. Haw. 1913, and confirmed and approved the Utilities Act of 1913 by making the same applicable in all respects to "all public utilities and public utilities companies organized or operating within the Territory of Hawaii." The Act of Congress amending and ratifying Act 135, S. L. Haw. 1913, reads in part as follows:

"The franchises granted by [various territorial acts approved by Congress] *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii,* and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory \* \* \* *Provided, however, that nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce* \* \* \* " (Italics indicate additions to Act 135, S. L. Haw. 1913, made by Congress).

By the Act of September 7, 1916, c. 451, 39 Stat. 728 (U. S. C. Tit. 46, s. 801, *et seq.* summarized in Petitioner's brief, Appendix pp. 51-56) (hereinafter referred to as the "Shipping Act, 1916") there was created the United States Shipping Board with certain regulatory powers over carriers engaged in transportation by water of passengers or property between places in the same territory. Petitioner relies on the Shipping Act, 1916,

for its position that as a matter of statutory construction the Territory has been divested entirely of its power to investigate the Petitioner and collect the statutory fees.

### **The Facts.**

Beginning in 1913 all public utilities operating in the Territory of Hawaii, whether or not holding congressionally approved franchises, and whether or not regulated by a federal agency, paid to the Commission all of the fees prescribed by the Utilities Act of 1913 (R. 69, 88); and all such public utilities except the Petitioner have at all times since then continued to pay statutory fees (R. 69). Beginning August 7, 1923 (R. 43)<sup>1</sup> the petitioner refused to make reports to the Commission and contended that the Utilities Act of 1913 had no application whatever to it, and that the Commission was without jurisdiction to make the investigations authorized under said Act. (Stip. of Counsel R. 44.)

This action was brought to compel the Petitioner to pay the statutory fees in order to provide the necessary funds to enable the Commission to carry out its powers and duties with respect to the petitioner under the Utilities Act of 1913.

The Supreme Court of the Territory of Hawaii in a decision rendered in 1931 on reserved questions raised by demurrer (*Territory v. Inter-Island S. N. Co.*, 32 Haw. 127, R. 12) held that the Shipping Act of 1916 did not divest the Commission of its power or duty to examine into and investigate the business of the Petitioner and that since the utility was subject to investigation by the Commission, it was obligated to pay the statutory fees:

<sup>1</sup> Petitioner stopped paying fees in March, 1923, that being the due date for semi-annual fees. (R. 3)



On the trial of the case the Commission introduced evidence showing that the total fees paid to the Commission have been insufficient to pay the expenses for carrying on the work of the Commission (R. 70), and that at any one time the Commission had on hand only the most insignificant balances; that from time to time between 1913 and 1929 the legislature of the Territory of Hawaii appropriated sums of money, amounting in all to \$38,182.61, in order to carry on the work of the Commission (R. 70, 107); that in 1929 a specific appropriation of \$5,000.00 was made for the Commission which was set apart for the purpose of paying the expenses of the Commission in connection with the litigation of the position taken by the Petitioner (R. 70, 108-109); that no portion of the fees paid by utilities has ever gone into the general revenues of the Territory (R. 70). There was evidence that during 1916 and 1917 the Commission expended on account of an investigation of the petitioner, an amount greatly in excess of the fees paid by the petitioner during those years (R. 71, 124-125).<sup>1</sup> It was stipulated (R. 43-44) that the

<sup>1</sup> The Petitioner advances the contention in this Court (Pet. Br. 24) that because the order of the Commission dated September 28, 1917 (entered as a result of a general investigation of the Petitioner in 1916 and 1917), purporting to reduce the rates and charges of the Petitioner, was declared by the Supreme Court of the Territory of Hawaii to be beyond the jurisdiction of the Commission (*Re Inter-Island S. N. Co.*, 24 Haw. 136), evidence as to cost of making such investigation has no relevancy in determining the reasonableness of fees. It is clear, however, that the investigation made was fully within the jurisdiction of the Commission and that the relief which the investigation disclosed was required should, according to the ruling of the Supreme Court (*Territory v. Inter-Island S. N. Co.*, 32 Haw. 137; 33 Haw. 890), have been obtained by appropriate proceedings before the Shipping Board. The cost of such investigation was very material evidence if this Court should hold that the Petitioner is in any position in these proceedings to raise the issue as to the reasonableness of the fees. (R. 125, Analysis of Disbursements, Ex. C., R. 71, 69.)

Commission did not investigate the petitioner during the period in question (during which the Petitioner insisted the Commission lacked power to investigate) and that the Petitioner made no reports to the Commission except that the auditor examined the Petitioner's books to ascertain the statutory fees payable by the Petitioner (R. 43). The Petitioner rested on evidence that the reasonable value of the auditor's services for time spent in ascertaining the statutory fees did not exceed \$30 (R. 103). The Petitioner objected to any testimony as to what the expenditures of the Commission had been prior to 1922 (R. 89). The trial court, upon the objection of the Petitioner, refused to admit evidence as to what an investigation of the business of Petitioner would cost, because, on the theory of the Petitioner, such evidence was not material (R. 126, 128).

It appears from the statutes as well as the record (R. 130-133) that the work required by the Commission in investigating federally regulated utilities is practically identical with that required for utilities locally regulated, the only difference being that with regard to the former utilities [identified as Group "A" utilities (R. 88)] the regulatory orders are required to be entered by the Federal agency; while in the latter utilities [identified as Group "B" utilities] the Commission may enter its own orders. The petitioner attempts in its brief (pp. 8, 22) to show that the majority of expenditures of the Commission were for Group "B" utilities. While it is true that for the period from 1922 to 1930 the auditor testified the majority of expenditures were for Group "B" utilities (R. 121) it was shown on redirect examination that this was a mere matter of accident during the years in which the petitioner (one of the three largest utilities in the Territory) (R. 69) was paying no fees. The auditor testi-

fied that for the period 1917 to 1922 inclusive, if expenses were allocated on the basis of hearings held, it would be found sixty per cent of such hearings involved Group "A" utilities; and forty per cent Group "B" utilities (R. 136). It is fair to say that it appears from the record that if the Petitioner had paid its fees and the Commission had had funds with which to discharge its duties with regard to Petitioner, the proportion of expenditures attributable to the two classes of utilities (if this is a material fact) would have been greatly altered.

The hearing on the trial closed on March 5, 1933 (R. 156). Six months later the Petitioner filed an amended answer (R. 29) contending that in addition to all other defenses theretofore interposed, it was engaged in interstate and foreign commerce (R. 156). Over objection of the respondent, evidence was then introduced tending to show that although the Petitioner is a domestic corporation whose business is entirely conducted between points within the territorial limits (R. 196-197), and although Petitioner has no through rates, issues no through bills of lading, and does entirely a local business (R. 197), a portion of its freight, after delivery by Petitioner, is transported to the mainland of the United States or to foreign countries in a continuous journey, and likewise a portion of the freight that it receives for transportation is received in the Territory from foreign countries or the mainland of the United States (R. 183-198).

The trial court ruled that Congress, by the enactment of the Act of March 28, 1916, expressly ratified and approved the Utilities Act of 1913, and adopted the Commission as its agency to have the investigatory powers with regard to federally regulated utilities provided by the Act, and approved the measure of the fees as set

forth in the Act (R. 57-62); that it was not necessary to consider the incidental effect, if any, of the exaction of the fees upon interstate and foreign commerce (R. 58); that there was no showing that the fees were disproportionate to the services required of the Commission (R. 61-62).

The Supreme Court of Hawaii found that there had been no showing that the fees prescribed to enable the Commission to perform its duties under the Act were disproportionate to the services required to be performed, and that the making of an investigation was not a condition precedent to the collection of the fees, and that if they were not unreasonable, they did not burden interstate or foreign commerce (R. 261-267).

The opinion of the Circuit Court of Appeals is not clear,<sup>1</sup> but counsel understands from it that the court found that Congress had expressly ratified the Act creating the Commission (R. 330); and the court further held that if it be assumed that the Commission had no power to investigate the Petitioner in the conduct of interstate commerce (which matter the Court stated it did *not* decide) (R. 333) still the Petitioner conducted a large purely intra-territorial business which had no relationship to interstate commerce, and that even assuming that the investigation powers of the Commission were limited to this field, the Petitioner could be required to pay the statutory fees (R. 334). The Circuit Court of Appeals further held, after giving consideration to the recently decided cases of *Great Northern*

<sup>1</sup> The Circuit Court of Appeals apparently failed throughout its opinion to distinguish between "interstate commerce" in the constitutional sense, and intra-territorial commerce, treated by definition for purposes of the Shipping Act, 1916, like interstate commerce. (See R. 330-336.)

*Railway Co. v. State of Washington*, 300 U. S. 154, 160, and *Bourjois, Inc., v. Chapman*, 301 U. S. 183, 197, that upon the record of past income and expenses<sup>1</sup> there was a clear showing that the fees prescribed by the statute were not unreasonable or disproportionate (R. 336).

### QUESTIONS PRESENTED.

1. Is the Utilities Act of 1913 inapplicable by its own terms to the Petitioner by reason of the kind of freight Petitioner carries?

2. Has the Utilities Act of 1913<sup>1</sup> and the collection of the fees prescribed therein had the ratification and approval of Congress by the enactment of the Act of March 28, 1916?

3. If congressional approval is shown to the exaction of non-discriminatory utility fees from all local utilities, to be used to pay the expense of regulation of local utilities not federally regulated and the expense of investigation of local utilities which are federally regulated, is it any defense to an action for the collection of such fees that the fees are measured in part by gross receipts from freight alleged to be carried in interstate or foreign commerce?

4. Did Congress by the passage of the Shipping Act, 1916, divest the local Commission of its power of investigation and of its right to collect the fees to permit such investigation expressly provided for by the Utilities Act of 1913?

---

<sup>1</sup>Although the respondent submits that the Petitioner is estopped in these proceedings to claim that the fees are excessive where it has failed to pay the fees to permit investigation, a review of the record bearing on the reasonableness of the fees is set out *infra* p. 34, *et seq.*



5. Are the fees prescribed shown to be so excessive as to impugn the good faith of the law and to show that the law is in fact a revenue raising measure?

### SUMMARY OF ARGUMENT.

Where a public utility operating within the Territory of Hawaii is subject to rate regulation by a Federal agency, it is made the duty of the local Commission after investigation to institute proceedings before the Interstate Commerce Commission or other Federal body or court to correct the matters coming within the jurisdiction of such Federal agency. There is imposed upon all public utilities operating in the Territory and subject to investigation statutory fees measured by gross income and by outstanding capital stock of each utility. Under the Utilities Act of 1913 these fees must be used to defray the expenses of the Commission.

Congress, with plenary power over the affairs of the Territory, has ratified and approved the territorial legislation and by its own amendment confirmed its application to all public utilities organized or operating within the Territory of Hawaii. The ratification by Congress of the Utilities Act of 1913 disposes of every contention that the territorial law is invalid because it constitutes a burden on interstate or foreign commerce.

The Respondent contends that there is no inconsistency between the Utilities Act of 1913 as approved by Congress and the Shipping Act of 1916; that it affirmatively appears from the record that the exactions imposed by the statute are not more than sufficient and are probably insufficient in amount to enable the Commission to perform its duties with regard to the Petitioner; that the Utilities Act of 1913 is not a revenue

raising measure and legislative appropriations have been necessary from time to time to enable the Commission to perform its duties; that the Petitioner has completely failed in any respect to show that the fees are known to be unreasonable or have proven to be in excess of the amount needed to pay for the inspection services required to be rendered; that the Petitioner has failed to show discrimination or arbitrary administration, and in fact seeks in this case to gain an advantage over the other utilities by illegally refusing to pay the fees necessary to enable the Commission to investigate and by refusing to comply with the Act under the claim that it is not applicable to its business; that the case is controlled by the principles announced in *U. S. Nav. Co. v. Cunard S. S. Co.*, 234 U. S. 474; 481, which would have to be overruled to sustain Petitioner's position; that no conflict has been shown with the principles announced in *Great Northern Railway Co. v. State of Washington*, 300 U. S. 154.

### ARGUMENT.

**I—The Utilities Act of 1913 Providing for the Investigation of Federally Regulated Utilities is Clearly Applicable to the Petitioner.**

The Petitioner contends that it is engaged in interstate and foreign commerce because it carries freight which is moving in interstate and foreign commerce, and that as a matter of statutory construction the Utilities Act of 1913 is inapplicable in any respect to it. (Pet. Br. 14, 38)

The respondent contends that the clear meaning of the statute is that the same shall be applicable to all public utilities doing business in the Territory of

Hawaii,<sup>1</sup> except where, and to the extent that, such application is prohibited by the Constitution or laws of the United States; and that the Congress of the United States has ratified and approved the applicability of the statute to all public utilities, including Petitioner, operating in the Territory of Hawaii. Respondent will show later in this brief that even without ratification by the Congress of the local statutes, the judgment in favor of the Commission must be sustained because the exaction of the fees does not conflict with either the Constitution or the laws of the United States.

The facts are not disputed that Petitioner is a Hawaiian corporation doing business only between points in the Territory of Hawaii, with no through rates, through contracts or transshipment contracts (Stip. of Counsel, R. 42; R. 198); that its business "since it began doing business under the Kingdom of Hawaii up to the present time has been the transportation of freight and passengers solely between the islands and ports of the Territory. There is no contention that the defendant itself operates or performs any service between ports within the Territory and ports on the mainland of the United States or foreign countries, except in so far as goods picked up at way ports may themselves be starting on a journey to ports outside of the Territory requiring trans-shipment at Honolulu to other vessels of other companies and bound for destinations beyond territorial waters; or except as other goods brought from distant ports to Honolulu are picked up by defendant's boats for distribution to points of consignment or ultimate destination on other islands of the Territory . . . The actual service rendered

<sup>1</sup> The Petitioner has conceded that it is a public utility within the definition contained in Sec. 18 of the Utilities Act of 1913 (Sec. 2208 R.L. Haw. 1925, *infra* Appendix p. 54) (R. 42).

by the defendant is a service of transportation wholly within territorial waters and between territorial ports regardless of destination or origin of goods." (Decision of Trial Court, R. 51-52; Stip. of Counsel, R. 42.)

Section 2210, Chapter 132, R. L. H. 1925 (Sec. 20, Utilities Act of 1913) provides as follows:

"Sec. 2210. *Application of this chapter.* This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, *except in so far as the same may be permitted under the Constitution and laws of the United States*; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

This section proclaims in statutory form the intention of the Legislature to go as far in the investigation or regulation of utilities as the Constitution and laws of the United States permit, and shows the legislative intention not to regulate or investigate in any manner unless the Constitution and the laws of the United States permit it. Petitioner has expressly conceded in this cause (R. 17) that "such authority as the Territory has over public utilities has in fact been granted to the public utilities commission." In other words, the Act purports to provide for the exercise by the Commission of every supervisory power permitted under the Constitution and the laws of the United States. Appellant urges in effect that the language of the statute *proprio vigore* renders the Utilities Act of 1913 inapplicable to it because it carried freight, which, within decisions of the United States Supreme Court, has been held (for purposes of showing that congressional power thereover is paramount) to be freight carried in interstate or foreign commerce.

An examination of the language of the statute will show that there would be no ground which would justify any construction other than that arrived at by the Supreme Court of the Territory of Hawaii (R. pp. 264-265) that the chapter is clearly applicable to the Petitioner. The language used throughout the Utilities Act of 1913 indicates that the legislature recognized the power in Congress to place regulatory authority over any local utility at any time and in any respect in some commission, body or board other than the local commission.<sup>1</sup>

It is also clear under the provisions of Section 2201 R. L. Haw. 1925 that the legislature contemplated in the event Congress exercised its power, the benefit of local supervision and investigation would still continue unless the same were contrary to an act of Congress.

Petitioner is attempting to have Section 2210, R. L. Haw. 1925 negative the definition of public utility contained in Section 2208 R. L. Haw. 1925 as though the former read

"This chapter shall not apply to public utilities operating within the Territory of Hawaii where any portion of the gross receipts of such utilities is derived from the carriage of goods intended to be carried or trans-shipped in interstate or foreign commerce or from goods brought to the Territory from the mainland or foreign countries."

<sup>1</sup> This matter was stated by the Supreme Court of the Territory of Hawaii as follows:

"The Legislature of Hawaii, in Section 13 of the Public Utilities Act [later Sec. 2201 R.L.Haw. 1925]; heretofore quoted virtually recognizes the power of Congress to place the regulation of the business of a public utility in some commission, board or court, other than the Public Utilities Commission, thereby taking such regulation out of the control of the Commission. *Re Inter-Island S. N. Co.*, 24 Haw. 136, 147."



It is apparent, however, that it was the legislative intention to have the Utilities Act of 1913 applicable to all utilities including the Petitioner unless prevented by the Constitution or laws of the United States. The claims of the Commission are based on specific language of the statute. *The conflict with the Constitution or laws of the United States must, therefore, be affirmatively and clearly shown* if the Petitioner is to be relieved under the terms of the statute of the duties imposed thereby; and the Petitioner's assertion (Pet. Br. 14, 38) that as a matter of statutory construction the Utilities Act of 1913 is inapplicable to it, is wholly without foundation.

## **II—Congress Has Ratified and Approved the Investigation of Federally Regulated Local Utilities and the Collection of the Statutory Fees to Permit Such Investigations.**

The trial court ruled that Congress, which has final and sole authority in the matter of legislation for the Territory of Hawaii as well as in the field of interstate and foreign commerce, by the enactment of its Act of March 28, 1916 (39 Stat. 38, c. 53) (*infra* Appendix p. 58) expressly adopted the machinery provided by the territorial statutes as the supervising machinery for all public utilities operating in the Territory "whether wholly local in these operations or incidentally affecting matters which could be denominated interstate and foreign commerce." (R. 57-60)

The following rather lengthy quotations are inserted herein because they state clearly the basis of the trial court's decision:

"But the complete answer to defendant's position is that the Congress which has this final and

sole authority, acted in 1916 under 39 Stat. 38, c. 53, (if not before under Organic Act, s. 55) and expressly adopted the commission in Hawaii as its agency to have such powers over any public utilities operating within the Territory, so long as the commission did not interfere with the interstate commerce commission; and, under subsequent legislation, as it should not interfere with the jurisdiction of the shipping board. These two federal bodies have by acts of Congress certain exclusive plenary powers but Congress had before it in 1916 the fact that the legislature of the Territory had created a public body to act as a watcher over public interests affected by the activities of public utility companies operating in the Territory. (For cases on construction in light of surrounding circumstances see *N. Y. etc. Ry. v. I. C. C.*, 200 U. S. 361; *Komada & Co. v. U. S.*, 215 U. S. 392; *St. Paul etc. Co. v. Phelps*, 137 U. S. 528; *Danciger v. Cooley*, 248 U. S. 319, 326; *N. Y. v. Knight*, 192 U. S. 21; *Alward v. Johnson*, 282 U. S. 509.) With that knowledge Congress expressly adopted this same body as its agency, simply modifying the plenary powers that might result from the existence of such a watchful, supervisorial commission." (Decision, Trial Ct. R. 57.)

\* \* \*

" . . . It [Congress] has by the act of March 28th, 1916, expressly adopted the machinery provided by the Territory as the Congressional machinery affecting all utility companies whether wholly local in these operations or incidentally affecting matters which could be denominated interstate and foreign commerce. In view of this approval and adoption by Congress and in view of the fact that Congress has wider powers within and under the Territory than it has in connection with states of the Union, this court cannot see that any useful purpose would be furthered by enter-

ing into a refinement of discussion of the cases involving the validity of state legislation. It may be safely assumed that Congress was aware of the location of Hawaii, distant from the mainland and acted or refrained from further modification of local action with such obvious facts in view. As to the Territory, Congress was a fully informed 'superior'." (Decision Trial Ct. R. 58-59.)

\* \* \*

" . . . Congress adopted this enactment by express reference and with no exceptions. By its adoption this court construed the fact to be that Congress has acted in regard to all public utilities knowing that the exactions of section 2207 R. L. 1925 were to be segregated exclusively into a fund to pay for the existence of this agency which was to watch over companies performing public utilities service for the people of the Territory." (Decision, Trial Ct. R. 60.)

The respondent contends that Congress has clearly indicated its approval of the machinery prescribed by the local statutes for the local supervision of utilities and the exaction of the fees to maintain such machinery; that the Commission is charged with the duty of making investigations of utilities federally regulated and of prosecuting actions before appropriate federal bodies when necessary; that Congress has plenary legislative power within the Territory as well as over the field of interstate and foreign commerce; that the approval of Congress disposes of any defense based on an asserted unconstitutional burden on interstate or foreign commerce.

**The Legislative Background Resulting in Congressional Amendment and Ratification Makes the Matter Clear.**

Although the statute seems clear on its face, Petitioner takes sharp issue (Pet. Br. 34-38) with the holding of the Trial Court and the Circuit Court of Appeals that the congressional approval contained in the Act of March 28, 1916, 39 Stat. 38, c. 53 (Appendix 58) had application to the Petitioner.

The circumstances under which the Act of Congress was adopted make it quite clear that Petitioner's contentions in this behalf present no substantial question for consideration by the Court.

In 1913 when the Utilities Commission was created, railroads operating wholly within the Territory of Hawaii were subject in all respects to the regulatory jurisdiction of the Interstate Commerce Commission under the provisions of the Act of June 29, 1906, 34 Stat. 584, c. 3591 (U. S. C. Tit. 49, s. 1) amending the Interstate Commerce Act; and such railroads have since annexation of Hawaii been subject to the detailed regulatory provisions governing almost every field of railroad operation contained in the Federal Safety Appliance Acts, (Act of March 2, 1893, c. 196, 27 Stat. 531 as amended by Act of March 2, 1903, c. 976, 32 Stat. 943, U. S. C. Tit. 45, s. 8 *et seq.*) The regulation of telephone companies operating in the Territory of Hawaii was placed under the jurisdiction of the Interstate Commerce Commission by the Act of February 28, 1920, 41 Stat. 456, and remained under such jurisdiction until the enactment by Congress of the Act of June 19, 1934, c. 652, s. 602 (b), 48 Stat. 1102, when regulatory jurisdiction was revested in the local Commission. Many other detailed regulatory Federal statutes have from time to time been made expressly applicable to

the utilities operated wholly within the Territory of Hawaii.<sup>1</sup>

The close relationship between the territorial and Federal governments was given recognition in the Utilities Act of 1913 and the Commission was expressly authorized and directed to investigate among other things *the compliance of the local utilities with all applicable Federal laws* with the duty of protecting the public by either making its own orders if the matter were in its regulatory power or by bringing proper proceedings before the Interstate Commerce Commission or such court or other body as might be appropriate. The distance of Hawaii and the difficulty of individual complaint furnishes ample legislative motive for the passage of the Utilities Act of 1913 in the form in which it was enacted.

To accomplish congressional ratification of the application of the Utilities Act of 1913 to utilities operating under franchises approved by Congress and utilities federally regulated, the 1913 Territorial Legislature enacted Act 135, S. L. Haw. 1913 (reprinted Appendix 56) to become effective upon its approval by the Congress of the United States. It should be noted, as was pointed out by the Trial Court, that in Act 135, S. L. Haw. 1913, all franchises which had theretofore been approved by Congress are specifically mentioned and referred to by Act number and approval date (R. 64). In 1916, when Congress had before it for consideration the ratification and approval of Act 135, S. L.

<sup>1</sup>As examples: Bills of Lading Act, Act of August 29, 1916, 39 Stat. 538, U.S.C. Tit. 49, Sec. 81 et seq.; Employees Compensation Act, Act of April 22, 1908, 35 Stat. 65, U.S.C. Tit. 45, Sec. 52 et seq.; Hours of Service of Employees, Act of March 4, 1907, 34 Stat. 1415, U.S.C. Tit. 45, Sec. 61 et seq.; Air Commerce Act of 1926, Act of May 20, 1926, 44 Stat. 568, U.S.C. Tit. 49, Sec. 171 et seq.



Haw. 1913, Congress amended the Act by inserting additional provisions in Act 135, S. L. Haw. 1913, and extending the scope thereof to include and cover all public utilities organized or operating within the Territory of Hawaii. By the Act of March 28, 1916; 39 Stat. 38, c. 53, (Appendix 58) Congress amended Act 135 by adding the language which is italicised hereunder, so that said Act of Congress reads in part as follows:

*“ . . . and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; . . . . ”*

Included among the utilities specifically referred to by name in Act 135, S. L. Haw. 1913, were railroads subject to the complete regulatory jurisdiction of the Interstate Commerce Commission. Congress, therefore, to prevent confusion, added the following proviso to Act 135 S. L. Haw. 1913:

*“ Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce.”*

The power of Congress under the Constitution to amend and extend the provisions of Act 135, S. L. Haw. 1913, and to ratify and confirm the applicability of the

Public Utility Act of 1913, has never been denied or doubted.<sup>1</sup>

Petitioner urges that under "the fundamental rule of *noscitur a sociis*," the Act of Congress has application only to franchised corporations (Pet. Br. 34). The mere reading of the statute would demonstrate that the decision of the Trial Court on this matter (R. 64), quoted hereunder is unassailable:

"Where language in an act is plain and unambiguous it needs no construction: In re the suggested application of the doctrine '*noscitur a sociis*' argued by counsel, the court calls attention to the following cases raising other principles of construction. The act of Congress under construction as well as the original act of the legislature of Hawaii (135, L. 1913) recited all the territorial legislature franchise acts then in existence, see R. L. 1925 Vol. II, p. 1980 *et seq.* The general language then following in the act of Congress which was added by Congress, would have no meaning if confined to term 'franchise'. The obvious, express class is, 'all public utilities operating in the Territory.' This is plain and all conclusive. It needs no 'construction'; nor can the title restrict the plain language thereof.

See *U. S. v. Fisher*, 2 Cranch. 358, 385-397 (Marshall, Ch. J.), 2 L. ed. 304, 313-317. *Pennock v. Dialogue*, 2 Peters 1, 7 L. ed. 327. *Yerke v. U. S.*, 173 U. S. 439, 43 L. ed. 760. *Texas v. Chiles*, 21 Wall. 488, 22 L. ed. 650. *Boudinot v. U. S.*, 11 Wall. 616, 20 L. ed. 227. *Lewis v. U. S.*, 92 U. S. 618, 23 L. ed. 513. *U. S. v. Ewing*, 184 U. S. 140, 46 L. ed. 471. *American Express Co. v. U. S.*, 212 U. S. 522, 53 L. ed. 635. *Caminetti v. U. S.*, 242 U. S. 470, 61 L. ed. 442. *Commissioner v. Gott-*

<sup>1</sup> *France v. Connor*, 161 U.S. 65, at 72; *Mormon Church v. U.S.*, 136 U.S. 1; *National Bank v. Yankton County*, 101 U.S. 129. Such power is specifically reserved in Section 6 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 s. 6 (31 Stat. 38).

lieb, 265 U. S. 310, 68 L. ed. 1031 (Decision, Trial Ct., R. 64)''

While recourse to the congressional debates is wholly unnecessary because the statute is unambiguous, the statements made in Congress at the time of the amendment and ratification of the Territorial Statute, which are referred to in the margin, show beyond any dis-

<sup>1</sup> H. R. 65, 64th Cong. 1st Sess. as originally introduced provided merely for the ratification of Act 135, S.L.Haw. 1913. The amendments made to Act 135, S.L.Haw. 1913, referred to above, were substantially as recommended by the Committee on Territories. See H. Rept. 43, 64th Cong., 1st Sess., p. 2, which report reads in part as follows:

"The second amendment, in line 2, page 3, to wit, 'and all franchises heretofore granted to any other public utility or public utility company, and all public utilities and public utilities companies organized or operating within the Territory of Hawaii,' is recommended, in order that *all of the public service companies and corporations may be embraced in the provision of this act.*"

On reporting the amendments on the floor of the House of Representatives, the following statement of the purpose of the amendments was made:

Mr. Dowell. " . . . Now, on the question of the amendments of the committee, the first amendment is found on page 3 and covers *any other public utilities not specified in the original act which may be doing business in the Territory.* That your committee believed to be necessary in order that some utility company doing business in the Territory, *though not having been granted a charter by Congress,* should be placed under this commission.

The second amendment, or the last amendment, provides 'That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the acts of Congress to regulate commerce within the States and the Territories of the United States.' That amendment was offered by your committee because there is a railroad in this Territory which rightly comes under the jurisdiction of the Interstate Commerce Commission, and it is *not the purpose to in any manner interfere with the power of the Interstate Commerce Commission.* . . . "

pute that Congress intended the Utilities Act of 1913 to apply to all utilities operating within the Territory.

### III—The Exaction of Territorial Utility Fees Approved by Congress Cannot Impose a Burden on Interstate and Foreign Commerce.

When Congress approves the exaction of fees by confirming the applicability of the Utilities Act of 1913 in all respects to all utilities operating in the Territory, all discussions of "burdens upon interstate or foreign commerce" are made superfluous. The Court may take judicial notice of the fact that virtually all carriers for hire in the Territory of Hawaii carry materials which are either received after transshipment or are to be trans-shipped into interstate or foreign commerce. The investigation fees are based in part on gross receipts from the utility business conducted entirely within the Territory of Hawaii. There can be no question but that Congress is acting constitutionally when it directs the exaction of fees measured by gross utility income earned by transportation between places within the Territory because Congress has plenary power over interstate and foreign commerce (U. S. Constitution,

---

Statement of Rep. Dowell in the House of Representatives, January 19, 1916, Cong. Rec. 64th Cong., 1st Sess., Vol. 53, Part 2, p. 1264.

It also appears Cong. Rec. *loc. cit. supra*, that the word "amended" inserted in the clause "is hereby amended, ratified, approved and confirmed, as follows:" was added from the floor (Rep. Mann) but the word "amended" was not carried into the title of H. R. 65, *supra*, but this cannot restrict the plain meaning of the statute. The title of the original Congressional bill is broad enough in any event to include the amendment.

<sup>1</sup> This was recognized in the Insular Territory of Porto Rico *People v. Central Fortuna*, 22 Porto Rico Rep. 100 where a local utilities tax was sustained.

Art. 1, sec. 8, cl. 3) and also has plenary power over the Territory (U. S. Constitution, Art. 4, sec. 3, cl. 2).

The constitutionality of the congressional assent to *state* regulation of interstate and foreign commerce and the validity of such regulation after congressional assent has been firmly established.

*In re Rahrer*, 140 U. S. 545;  
*Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17;  
*Phillips v. Mobile*, 208 U. S. 472;  
*De Bary & Co. v. La.*, 227 U. S. 108 (foreign commerce);  
*Foppiano v. Speed*, 199 U. S. 501.

If a *state* may with congressional assent tax or regulate interstate commerce, a territory clearly may with such assent exact non-discriminatory public utilities fees for support and maintenance of a local supervisory service.

At the time of the adoption of the Act of March 28, 1916, there was already a settled administrative construction by the Commission of the provisions of the Utilities Act of 1913. The Commission had collected from, and all utilities operating within the Territory (including Petitioner) had paid and continued to pay all of the fees prescribed by the Utilities Act of 1913 regardless of the nature of the freights carried, and regardless of the fact that the regulatory power over some utilities had been vested in a Federal agency. (R. 69, Ex. A; R. 88, 92)

If there were any questions as to the congressional intention, the settled prior administrative construction of the Utilities Act would be determinative of the proper construction to be put on the Act as it was approved by Congress.



*New York etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361;  
*Komada & Co. v. U. S.*, 215 U. S. 392;  
*St. Paul, etc., Ry Co. v. Phelps*, 137 U. S. 528;  
*Heiner v. Colonial Trust Co.*, 275 U. S. 232.

**IV—The Enactment by Congress of the Shipping Act of 1916, Did Not Divest the Local Commission of Its Powers of Investigation or Its Duty to Collect the Fees Provided to Permit Such Investigation.**

The Petitioner contends (Pet. Br. 32-34) and at all times since 1923 (when it stopped paying fees to the Commission) has contended (Stip. of Counsel R. 44) that the Commission is without jurisdiction to investigate the condition of the Petitioner or the manner in which it operates its business; that the enactment by Congress of the Shipping Act of 1916<sup>1</sup> creating the United States Shipping Board divested the Commission of its right, power and duty to make the investigations in express terms required or permitted to be made under the provisions of Section 2193, R. L. Haw. 1925; relieved the Commission of its statutory duty to make recommendations and institute and prosecute proper proceedings required by Section 2201, R. L. Haw. 1925; and consequently relieved the petitioner of its obligation to pay the statutory fees required by Section 2207, R. L. Haw. 1925.

<sup>1</sup> Petitioner can not seriously urge that because Petitioner operates vessels which are subject to Federal inspection for safety of facilities (Pet. Br. 6 and footnote) this precludes the investigations by the Commission of Petitioner's business and its relations to the public. See *Clyde Mallory Lines v. Alabama*, 296 U. S. 261. Intra-territorial railroads whose facilities are subject to the detailed provisions of the Federal Safety Appliance Acts and whose operations are subject to the regulatory jurisdiction of the Interstate Commerce Commission are nevertheless subject to investigation by the Commission. See also *Kelly v. Washington*, 302 U. S. 1.

The Territorial Supreme Court in 1917 had held that the Commission was without power after the enactment of the Shipping Act of 1916 to issue its own order reducing the rates of this Petitioner *Re Inter-Island S.N. Co.*, 24 Haw. 136. The Territorial Supreme Court likewise held in 1922, *In Re Haw. Tel. Co.*, 26 Haw. 508, that the Commission was without power to regulate by its own order the rates or charges of telephone companies operating wholly within the territory during the time that regulatory power over such companies was vested in the Interstate Commerce Commission. As heretofore indicated the respondent has not challenged the validity of these holdings in these proceedings.

It was on the basis of these decisions that Petitioner resisted the payment of all fees beginning with the year 1923 and contended that all powers of the Commission with regard to the business of Petitioner "in any respect or for any purpose" had been taken away from the Commission. (R. 8) Petitioner's contentions in this regard were the subject of the reserved questions of law certified to the Supreme Court in the present proceedings in 1930. (R. 9) The Supreme Court in a clear and unassailable opinion (R. 13) held that the Shipping Act did not repeal by implication or otherwise the provisions of the Utilities Act of 1913 authorizing the Commission to investigate federally regulated utilities doing business in the Territory of Hawaii. The Court states in this regard:

"And if it is authorized, as it is by Act 89, to make an investigation which is complete and effective,—solely for the purpose of placing the facts before the body authorized to regulate—can this power or its exercise be held to be in conflict with the power of the shipping board to regulate or with the intent of Congress that the shipping board

alone should regulate? We think not. In our opinion the power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom it may see fit to regulate. Under these circumstances, there can be no repeal by implication." (Op. of Sup. Ct., R. 24-25.)

Respondent has already shown that the machinery for supervision of utilities regulated by federal agencies had been expressly approved by Congress. If there were any doubt as to the propriety of the Territory investigating federally regulated utilities (such as railroads, which were specifically mentioned in the Act of Congress) such doubt had been completely resolved by the enactment of Congress earlier in the year of its Act of March 28, 1916.

The issue raised by Petitioner does not concern possible encroachment by the Territory upon a field exclusively within the power of Congress. The case involves two acts of Congress, which it is submitted are perfectly harmonious. When Congress approved the Utilities Act of 1913 by its Act of March 28, 1916, it was contemplated, as shown in language of the Utilities Act, that Federal statutes might from time to time extend federal control to other local utilities in the Territory. The enactment of the Shipping Act on September 7, 1916, is entirely consistent with the general plan for territorial supervision approved by Congress earlier in the year and does not repeal or withdraw that approval. *Panama R. R. Co. v. Johnson*, 264 U. S. 375.

Petitioner contends that even in the absence of congressional approval of the Utilities Act of 1913 there is no inconsistency or conflict between the federal and

territorial statutes, and that a territorial law enacted under the police power which supplements and makes the federal law more effective in attempting to enforce a compliance therewith is valid in the absence of such conflict or inconsistency.<sup>1</sup>

Petitioner attempts to show that because the Shipping Act includes intra-territorial commerce on the high seas within its definition of "interstate commerce" placed under the jurisdiction of the Shipping Board, the effect is to oust the local commission of *all jurisdiction for every purpose*. (Pet. Br. 32-34) In other words, Petitioner does not rely on any express statutory conflict, but relies on the general proposition that because Congress has declared Petitioner's business to be "interstate commerce" and has now occupied the field, territorial action is precluded. Petitioner's contention in this regard we shall demonstrate is squarely contrary to the principles which have been announced in the decisions of this Court.

**(a) The Shipping Act should be given like interpretation, application and effect as the Interstate Commerce Act.**

Petitioner concedes (Pet. Br. 32) and it is well settled that under the principles announced in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 481, the Shipping Act and the Interstate Commerce Act should be given a like

<sup>1</sup> *Chicago & N. W. R. R. v. Fuller*, 17 Wall. 560 (State law requiring the posting of interstate rates); *Railroad Commission Cases*, 116 U. S. 307; *Adams Express Co. v. Charlottesville Woolen Mills*, 109 Va. 1; *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957, 980. The visitatorial power of the Territory over corporations created by and existing under its laws is sufficient to establish Respondent's case (*Hale v. Henkel*, 201 U. S. 43). Counsel has been unable to find any authority and Petitioner refers to none, which denies to a sovereign power the right under its police powers to examine and investigate into the affairs of its own public service corporations.

interpretation, application, and effect. The Court in that case said:

"In its general scope and purpose, as well as in its terms, that act [Shipping Act] parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have a like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion." *U. S. Nav. Co. v. Cunard S. S. Co.* (*supra* at p. 481).

The application and effect of the Interstate Commerce Act in connection with the territorial powers of investigation have already had the attention of Congress and we have demonstrated that it was the definite congressional intention *not to preclude territorial investigations* in the field covered by the Interstate Commerce Act.

When the Act of March 28, 1916, which in its title and text refers to local railroads specifically, came before Congress for approval, Congress added the *proviso* as follows:

"Provided, however, that nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."

If the provisions of the Utilities Act of 1913 giving the Commission power to examine railroads and collect fees were rendered ineffective by the Interstate Commerce Commission's occupancy of the field, the



ratification by Congress and the proviso added would be wholly meaningless.<sup>1</sup>

If Congress did not intend to preclude territorial investigation of local railways or local telephone companies because they were federally regulated by the Interstate Commerce Commission, it is clear that Congress by enacting the much less comprehensive Shipping Act of 1916 did not intend to preclude investigation of the carriers by water subject to that act. (*U. S. Nav. Co. v. Cunard S. S. Co. (supra)*).

Therefore Petitioner is seeking to obtain an interpretation of and effect from the Shipping Act of 1916 different from that given by Congress itself to the Interstate Commerce Act. For Petitioner to succeed in this contention would necessarily involve the overruling by this Court of the principles announced in the *U. S. Nav. Co. v. Cunard S. S. Co. (supra)* decision.

**(b) Analogous statutes have been enacted in other jurisdictions.**

Because of the relationship of the local government to the Federal Government and because of the distance from the mainland of the United States, there are particular reasons for public authorities in this Insular Territory attempting through a central local agency to assure compliance by utilities with all Federal and Territorial laws. However, even without express Congressional sanction, in a number of states legislation has been enacted requiring local commissions to investigate

<sup>1</sup> The inclusion of the amendment was for the purpose of making certain that the Interstate Commerce Commission was not ousted from its jurisdiction, and not for the purpose of excluding local railways from the Utilities Act of 1913, as shown by the legislative history of the Act of March 28, 1916. (See *supra* p. 25 and footnote.)

interstate carriers' compliance with orders, decrees, rules and regulations of the Interstate Commerce Commission and the reasonableness of their rates, charges and practices, and authorizing local commissions to bring proper complaints where they are justified. (Supreme Court Op., R. 25.) For the convenience of the Court, there has been reprinted in the Appendix (pp. 61-71) copies of the investigation statutes of the several states referred to by the Supreme Court of Hawaii in its opinion. (R. 25)

The validity of these statutes appears never to have been judicially questioned,<sup>1</sup> and it is apparent that, where Congress approves of the supervisory arrangement, such approval is controlling.

**V—The Fees Are Not Excessive or Unreasonable and Their Collection Does Not Violate Any of Petitioner's Constitutional Rights.**

Petitioner contends that even if it be held that the Commission has authority to investigate Petitioner's business, nevertheless Petitioner cannot be compelled to pay the statutory fees because the imposition of such fees imposes a direct burden on interstate and foreign commerce (Pet. Br. 16 to 30); that the fees are so ex-

<sup>1</sup> The validity of a typical provision is declared in *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957, 980, as follows:

"From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the Legislature of the state to enter the domain of interstate regulation of railroad traffic. The commission is a state commission, designed to render state service, and no intentment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution."

cessive and unreasonable in relation to work performed during the period by the Commission as to amount to a taking of Petitioner's property without due process of law. (Pet. Br. 30-31).

Upon the latter contention Petitioner states that its argument is the same as that relating to interstate and foreign commerce (Pet. Br. 31), hence we shall consider the matter of the claim of excessiveness under one heading.

**(a) Petitioner is estopped to claim that the fees are excessive in this proceeding.**

Before considering the record, which we contend affirmatively shows that the fees are in all respects reasonable and proper, we urge upon the Court that Petitioner is estopped in these proceedings from contesting the reasonableness of the fees prescribed by the statute. It appears from the record (R. 70, 130) that the ability of the Commission to carry out its duties, and the extent to which its investigations may be made to extend is largely determined by the amount of money which is available for the Commission.<sup>1</sup>

When Petitioner refused to pay fees, it did so, as is shown by the record, not because past history had demonstrated that the fees were known to be excessive (R. 44, 89, 126-127, 131) but because Petitioner contended that the Utilities Act of 1913 no longer had application in any respect to Petitioner's business. (R. 44)

<sup>1</sup> The Court may take judicial notice that lack of finances has been one of the chief factors hampering public utility commissions generally in carrying out their functions. *Mosher & Crawford, Public Utility Regulation* (1933) 67-81. See *Douglass v. Arizona Edison Company*, 1 P. U. R. (N. S.) 493, 498 (Ariz. Corp. Comm., 1933); *re Alabama Power Co.*, P. U. R. 1932, E. 323, 328-330; (Ala. Pub. Serv. Comm., 1932); 46 *Yale L. Journal* 1251.

Bearing on the reasonableness of the fees, the only evidence offered by Petitioner in defense was proof of the fact that had been stipulated to prior to trial (R. 44), viz: that during the period of the refusal to pay fees (1922-1930) no investigation of Petitioner had been made by the Commission. This theory of the defense was consistently maintained by Petitioner throughout the trial (R. 89, 100, 102, 116, 126-128, 131) and throughout the appeal to the Supreme Court. (R. 278). As we understand Petitioner's position, it is still their contention in this Court that the reasonableness of the fee must be tested by the value of services *actually performed for the utility*, and that based upon such "services rendered" (Pet. Br. 19) the greatest fee that can constitutionally be collected from Petitioner for the years 1922 to 1929 inclusive is \$30. (Pet. Br. 16, 19, 21, 27, 28, 29.)

No attempt was made by Petitioner to show that the fees sought to be collected were known to be in an unnecessarily large amount. (R. 131). In fact Petitioner disavowed any intention of showing (R. 89, 94) that the fees would be in excess of what would actually be required to make the investigations contemplated by the statute. (R. 128, 131). The only evidence introduced by Petitioner on this behalf was evidence as to the reasonable value of the services performed by the Commission's auditor in ascertaining for purposes of preparing this litigation the amount of the fees that were required to be paid by Petitioner (R. 100-103), upon which showing Petitioner rested. (R. 103). In other words, Petitioner's theory was that the recovery of fees could only be maintained upon the same theory as the recovery for services rendered at the request of Petitioner under a *quantum meruit* count. (R. 89, 126-127,

131) It is only by reason of a legislative appropriation obtained in 1929 that the Commission was able to bring into litigation the contention of Petitioner. (R. 108) We submit that in fairness to the Commission and to the other utilities, who consistently complied with the statute, Petitioner should not be permitted to claim after refusing to pay the fees and effectively preventing the Commission from carrying out its powers and duties, that it is not obligated to pay the fees because the Commission has not done what Petitioner said it could not lawfully do. In one breath Petitioner says the Commission is without power to investigate and hence to collect fees; and in the next breath Petitioner says the Commission cannot constitutionally collect the fees without first performing the services required by making an investigation of its business. If this position were sound, all that any large utility or group of utilities in the Territory of Hawaii would have to do is to refuse to pay fees under an assertion of invalidity; the Commission could make no investigation because it is dependent on such fees, and hence the Commission could not constitutionally collect fees. Due process of law does not require or permit any such absurdity.

(b) The judgment entered herein is consistent with the principles announced in *Great Northern Railway Co. v. Washington*.

If it be assumed that Petitioner is in a position to urge the excessiveness of the fees in these proceedings it is submitted that the record affirmatively shows that the fees are not excessive nor their collection unconstitutional under the principles announced in *Great Northern Ry Co. v. State of Washington*, 300 U. S. 154.

With regard to burdening interstate commerce, the trial court held that the statute provided a reasonable



method of meeting the expenses of public utility supervision provided by the statute; that the expense was in fact distributed equally and without discrimination (R. 62); that Congress adopted and approved the method of division of expense without exceptions and that this disposed of any question as to whether the fees burden interstate or foreign commerce. (R. 62-53)<sup>1</sup>

It is apparent that in Congress and the Territory together there resides legislative power to constitutionally impose nondiscriminatory public utility taxes on utilities operating in the Territory. It follows that even if in fact there should be brought into the Commission's fund a substantial surplus (which is unlikely and which thus far has not happened, R. 70) such surplus would have been validly collected under the taxing power of the Territory and Congress.<sup>2</sup>

<sup>1</sup> Wholly apart from congressional approval, we submit that there is a sufficient separation in fact between transportation carried wholly between points in the Territory by Petitioner, and interstate and foreign commerce in the constitutional sense so that a non-discriminatory public utilities tax measured by the gross income received from the intra-territorial commerce of the Petitioner could be sustained. The fact that the islands are not contiguous to any other portion of the United States furnished a factual difference which distinguishes this case from cases like *Galveston Ry. Co. v. Texas*, 210 U. S. 217 (Pet. Br. 15). See *Pennsylvania R. Co. v. Knight*, 192 U. S. 21; *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549; *People v. Central Fortuna*, 22 Porto Rico Rep. 100 (Writ of error dismissed, 243 U. S. 659); *Ponce Lighter Co. v. Mun. of Ponce*, 19 Porto Rico Rep. 725.

<sup>2</sup> See *Texas Co. v. Brown*, 258 U. S. 466 where this Court held that the State could not without the consent of Congress impose a tax directly on interstate commerce, but that where investigation fees were well within the field of permitted state action, the imposition could be for revenue as well as inspection purposes, and that the excess collected over cost of inspection represented a state tax validly imposed. See also: *Noble State Bank v. Haskell*, 219 U. S. 104, 110; *Moulin Timber Co. v. Washington*, 243 U. S. 219, 245; *Charlotte C. & A. R. Co. v. Gibbs*, 142 U. S. 386; *People ex rel. N. Y. Electric Lines Co. v. Squire*, 145 U. S. 175.

So long as the tax is within the field of general legislative power of the Territory it would seem that the classification of taxpayers was a matter for legislative determination:

*N. Y. Rapid Transit Corp. v. N. Y. C.*, 304 U. S. 573, (A special tax for relief imposed on utilities subject to supervision of department of Public Service was held valid);

*Cincinnati Soap Co. v. U. S.*, 301 U. S. 308, 323; *Talbott v. Silver Bow County Commissioners*, 139 U. S. 438, 446;

*Great Northern Ry. v. Washington*, 300 U. S. 154, 168. (Dissenting opinion of Cardozo, J.)

The *Great Northern* case purported to approve the principles established in *Foote & Co., Inc. v. Stanley*, 232 U. S. 494. In this case the Court held invalid an inspection charge of one cent per bushel on oysters coming into Maryland in interstate commerce from other states because it was shown that the charge regularly yielded a revenue greatly in excess of the amount required to make the inspection, which excess was expended in discharging general state policing functions. The Court states as its reasons:

"Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that

the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the legislature will reduce the fees to a proper sum. *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 393, 56 L. Ed. 244, 32 Sup. Ct. Rep. 152. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then they are obliged to act in the light of those facts, and to give effect to the provision of the Constitution prohibiting the collection by a state of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the legislature for inspection proper as *prima facie* reasonable, and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered." (pp. 503-504)

Regardless of the burden of proof, it is clear that the unconstitutionality of the statute on the ground of excessiveness can be established in any event only if it is shown that "what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued." *Foote & Co. v. Stanley*, *supra*, *Great Northern Ry. v. State of Washington*, *supra*.<sup>1</sup> Not only is this proof lacking but all elements are lacking which could in any way result in the burden of proving the reasonableness of the fees being shifted to the Territory. In the *Great Northern Ry.*

<sup>1</sup> This principle was established by a line of cases: *New Mexico ex rel. McLean v. Denver etc. R. Co.*, 203 U. S. 38; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345.

Co., case it appeared from the majority opinion that the burden of proof was shifted to the state because either rightfully or wrongfully large sums of money paid to the commission by railroads doing interstate as well as intra-state business had been spent in connection with the appearance of the Department before the Interstate Commerce Commission and in connection with reparation suits. It also appears that no legislative appropriation had been made and that during the period from 1923 to 1929 there had been an accumulation in the surplus of the Department of some \$225,000.

In the case at bar Petitioner, after paying the fees for the years 1913 to 1922 inclusive (R. 69), paid no fees for the years in dispute claiming that the statute was inapplicable. From the year 1913 to and including the year 1929 the Territorial Legislature from time to time made appropriations to permit the Commission to carry out its functions (R. 70, 107, 108, 109) and in fact it was necessary for the Legislature to appropriate \$5,000.00 in 1929 for the very purpose of paying for legal services in connection with the bringing of the suit which is now before this Court. (R. 108) The record further shows that at the time Petitioner refused to pay the fees the Commission did not have and in fact never has had on hand more than a very insignificant balance (R. 70), and there is no evidence that could possibly support a finding that the statute was in truth a revenue raising measure. The record further shows that in the years during which the Petitioner was paying its required fees, the Commission had undertaken a comprehensive investigation of Petitioner's rates and charges and that during the years 1916-1917 the Commission incurred direct expenses in the amount of \$7,-

239.58 (R. 125) and indirect expenses attributable to Petitioner in the amount of \$5,385.20 (R. 125) or a total of \$12,624.78 during a period in which Petitioner in fact paid the Commission total fees of less than \$5,000.00 (R. 69)<sup>1</sup>

It further appeared that up to the time of these proceedings no rate base had been established for Petitioner (R. 133) and upon objection of Petitioner the trial court refused to admit evidence as to what an investigation of the business of Petitioner would cost because, on the *theory of Petitioner*, such evidence was not material. (R. 126, 130) In this Court, for the first time, Petitioner is urging the contention that the statute is invalid *on its face* because it exacts the same fees from utilities locally regulated as from utilities federally regulated but locally supervised. (Pet. Br. 8, 21-23, 39)

Petitioner by this latest contention is attempting to raise a new factual issue; that is, whether the expense in

---

<sup>1</sup> Petitioner strenuously objects to a consideration of the cost of this investigation because the order entered reducing rates was held to be beyond the jurisdiction of the Commission. But that the investigation was within the admitted jurisdiction of the Commission cannot be denied and was expressly admitted by the utility in that proceeding and in the printed argument filed November 17, 1917 by the utility, in *In re Inter-Island S. N. Co.*, 24 Haw. 136 (No. 1984 Supreme Court of Hawaii) appears the following (p. 45):

“(i) After September 7, [1916] the Commission knew that they had no power to fix rates; their power was to investigate, and, under Section 2233, [later Section 2201 R. L. Haw. 1925] begin a proceeding before the Shipping Board to have their recommendations carried out. *The whole record shows that this is what they were doing, and, in case their investigation showed the rates were too high, they could have applied to the Shipping Board under Section 2233.*” (Explanatory matter in brackets inserted.)



connection with the investigation of federally regulated utilities must not in fact be substantially less than the expense of investigating local utilities and entering regulatory orders. This is the very matter that on the trial Petitioner contended was immaterial. (R. 89) We fail to see why it must not in the absence of evidence be assumed that it costs more to investigate and bring proceedings before federal agencies than it does to investigate and enter regulatory orders. The legislative determination of reasonableness and Congressional consent to the exaction of similar fees from all utilities would seem to be a complete answer to any claim of inequality between the classes of utilities.

The recent case of *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 187, completely disposes of Petitioner's present contention. The Court said, in passing on the validity of an inspection fee sought to be collected in advance of inspection:

"It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirements, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face. . . . The mere fact that fees imposed might exceed the cost of inspection is immaterial."

The legal position of Petitioner is in no way analagous to the position of the railroads in the *Great Northern Railway Co. case*, and if the language in the majority opinion can be construed as requiring the Territory to adduce proof of the reasonableness of fees prior to the time that such fees are paid and prior to the time that it can be ascertained what the cost of investigation and

supervision will be, then such a requirement should be re-examined by this Court.<sup>1</sup>

In summary, on this phase of the case we have shown that the Great Northern Railway Co., case, *supra*, makes it clear that the fees are not invalid for any unreasonableness appearing on the face of the statute. The later case of *Bourjois, Inc. v. Chapman* and all the authorities clearly establish that once it is shown that an inspection fee statute is not invalid on its face, then the Court will not indulge in conjecture as to whether the fees when paid will or will not exceed the amount reasonably needed to carry on a proper governmental function in a field well within the Territory's power and in a manner sanctioned by the Federal Government.

<sup>1</sup> In *Great Northern Railway Co. v. State of Washington* (*supra*) because of the expenditures incurred by the department in reparation cases before the Interstate Commerce Commission (p. 168) there may have been some question, as stated in the dissenting opinion of Cardozo, J., as to whether the case was not one involving the exercise of "a power [which] has been granted to be used in exceptional circumstances"—in which event the rule is that the "State must bring itself within the exception if it seeks to act within the grant." (p. 169). Here it can be shown without question: "A different situation confronts us in the case at hand. Here a statute of the state [or territory] does not trespass upon a field of legislation where entry is forbidden without the license of the nation. What has been done is well within the field of general legislative power, with every presumption of validity back of it. In such circumstances the burden of making good a claim of invalidity and thus establishing an exception is on the assailants of the rule, and not on its proponents." (p. 170)

It also appears that the question suggested by Cardozo, J., (p. 168) as to "whether anything in the Fourteenth Amendment forbids the recognition of a single and all inclusive class of public service corporations without further subdivision," has since been clearly answered in the negative by this Court in *N. Y. Rapid Transit Corp. v. N. Y. C.*, 304 U.S. 573.

See also: 46 Yale L. Journal, 1251 [note]; 85 U. of Pa. L. Rev. 639; 4 U. of Chicago L. Rev. 505; 36 Mich. L. Rev. 163.

**CONCLUSION.**

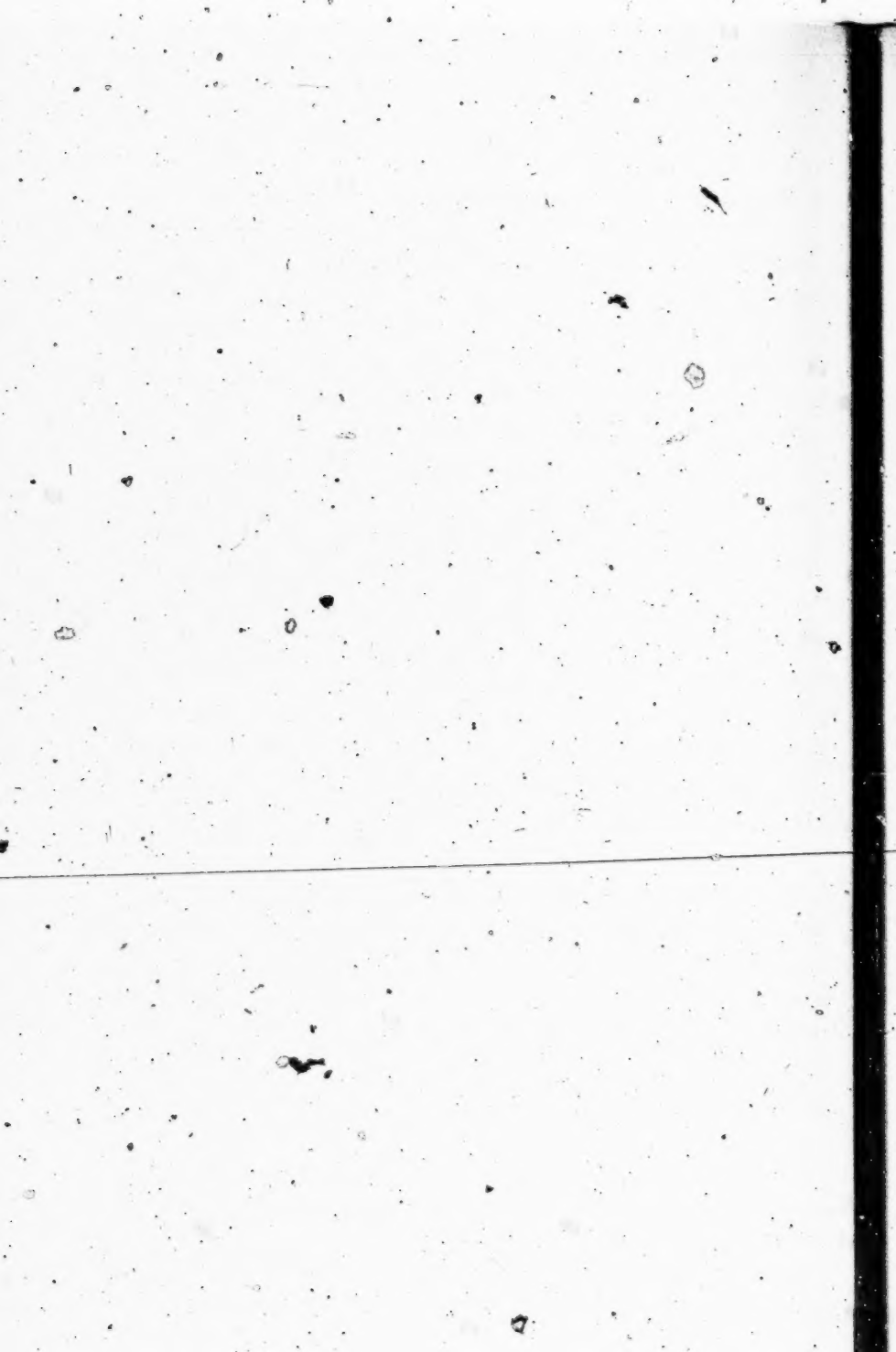
It is respectfully submitted that the case involves no conflict between the exercise of territorial and federal powers and that the various defenses of unconstitutionality and illegality sought to be made out by Petitioner are wholly invalid in their application to a congressionally approved territorial law; that the Utilities Act of 1913 is in all respects applicable to Petitioner and its applicability to all utilities operating in the Territory of Hawaii has had the express approval of Congress by the enactment of the Act of March 28, 1916, that so long as the rates, charges and practices of Petitioner are federally regulated, Petitioner is included under the Utilities Act of 1913, in the class of utilities expressly made subject to investigation by the Commission; that the approval by Congress of the applicability of the Utilities Act of 1913 to all utilities dispenses with all questions of burdens on interstate or foreign commerce; that there is no showing of any kind that the fees were known to be unreasonable or excessive in amount or that the fees are exacted for revenue raising purposes rather than for the *bona fide* purpose of permitting the Commission to discharge its duties with respect to Petitioner; that the judgment of the Circuit Court of Appeals must therefore be affirmed.

Respectfully submitted,

JULIUS RUSSELL CADES,  
*Attorney for Respondent.*

URBAN EARL WILD,  
*Of Counsel.*

Dated at  
Washington, D. C.,  
November 7, 1938.



# APPENDIX

---



APPENDIX

## APPENDIX A.

*Utilities Act of 1913*

This statute was originally Act 89 of the Session Laws of Hawaii 1913, as amended by Act 127 of the Session Laws of Hawaii 1913, and took effect on July 1, 1913. This Act together with certain amendments which are not material to the case at bar became Chapter 132 of the Revised Laws of Hawaii 1925 said Chapter controlling these proceedings. The chapter is summarized in Petitioner's Brief, Appendix pages 41-46.

For the convenience of the Court there is shown in the table hereunder the original sections of said Act 89, Sessions Laws of Hawaii 1913, and the corresponding sections in which they subsequently appear in the Revised Laws of Hawaii 1925. All pertinent provisions of the Chapter are quoted herein, following the table.

*Act 89, S. L. Haw. 1913      Revised Laws of Hawaii 1925*

Section 1.....	Section 2189
2.....	2190
3.....	2191
4.....	2192
5.....	2193
6.....	2194
7.....	2195
8.....	2196
9.....	2197
10.....	2198
11.....	2199
12.....	2200
13.....	2201
14.....	2202
15.....	2205
16.....	2206
17.....	2207
18.....	2208
19.....	2209
20.....	2210

Section 4, Act 89, S. L. Haw. 1913; Section 2192, R. L. Haw. 1925, provides:

"Sec. 2192. *General powers and duties* The commission shall have the general supervision hereinafter set forth over all public utilities doing business in the Territory, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter."

Section 5, Act 89, S. L. Haw. 1913; Section 2193, R. L. Haw. 1925, provides:

"Sec. 2193. *May investigate what.* The commission and each commissioner shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum."

Section 6, Act 89, S. L. Haw. 1913; Section 2194, R. L. Haw. 1925, provides:

"Sec. 2194. *Public utilities to furnish information.* Every public utility shall at all times, upon request, furnish to the commission all information that it may require, *respecting any of the matters concerning which it is given power to investigate*; and shall permit the examination of its books, records, contracts, maps, and other documents by the commission, or any of its members, or any person authorized by it in writing to make such examination, and shall furnish the commission with a complete inventory of its property in such form as the commission may direct."

Section 7, Act 89, S. L. Haw. 1913; Section 2195, R. L. Haw. 1925, provides:

"Sec. 2195. *Report accidents.* Every public utility shall report to the commission all accidents caused by or occurring in connection with its operations and service, *and the commission shall investigate the causes of any accident which results in loss of life, and may investigate any other accidents which in its opinion require investigation.*

Section 8, Act 89, S. L. Haw. 1913; Section 2196, R. L. Haw. 1925, provides:

"Sec. 2196. *Commission may compel attendance of witnesses, etc.* In all investigations made by the commission, and in all proceedings before it, the commission and each commissioner shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, examining witnesses, and punishing for contempt, as are possessed by circuit judges at chambers. In case of disobedience by any person or persons to any order of the commission or of any commissioner,

or any subpoena issued by it or him, or of the refusal of any witness to testify to any matter regarding which he may be questioned lawfully, it shall be the duty of the any circuit judge, on application by the commission or a commissioner, to compel obedience as in case of disobedience of the requirements of a subpoena issued from a circuit court, or a refusal to testify therein. No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hearing before the commission or any commissioner, when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence. Nothing herein contained shall be construed as in any manner giving to any public utility immunity of any kind. The fee and traveling expenses of witnesses shall be the same as allowed witnesses in the circuit courts, and shall be paid by the Territory out of any appropriations available for the expenses of the commission.

Section 9, Act 89, S. L. Haw. 1913; Section 2197; R. L. Haw. 1925, requires each utility to publish its rates, charges and rules in the manner required by the Commission.

Section 10, Act 89, S. L. Haw. 1913; Section 2198, R. L. Haw. 1925, provides:

"Sec. 2198. *Notice of hearings.* Whenever an investigation is undertaken by the commission, reasonable notice in writing of such fact and of the subject or subjects to be investigated shall be



given to the public utility concerned, and when based upon complaints made to it as prescribed in section 2193, a copy of such complaint, *and a notice in writing of the date and place fixed by the commission for beginning such investigation*, shall be served upon the public utility and the complainant not less than two weeks prior to the date designated for such hearing."

Section 11, Act 89, S. L. Haw. 1913; Section 2199, R. L. Haw. 1925, provides:

"Sec. 2199. *Right to be represented by counsel.* At any investigation by or proceeding before the commission, the public utility concerned and any complainant shall have the right to be present and represented by counsel, to present any evidence desired and to cross-examine any witnesses who may be called."

Section 12, Act 89, S. L. Haw. 1913; Section 2200; R. L. Haw. 1925, provides:

"Sec. 2200: *Commission may make rules.* The commission may make and amend rules not inconsistent with law respecting the procedure before it, and shall not be bound by the strict rules of the common law relating to the admission or rejection of evidence, but may exercise its own discretion in such matters with a view to doing substantial justice."

Section 13, Act 89, S. L. Haw. 1913; Section 2201, R. L. Haw. 1925, provides:

"Sec. 2201. *May make recommendations and bring suits.* If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, addi-

tions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. *The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best.*"

Section 14, Act 89, S. L. Haw. 1913; Section 2202, R. L. Haw. 1925, provides:

"Sec. 2202. *Regulate rates, etc.; appeals.* All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its own motion, or upon complaint, and in so far as it is not prevented by the Constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and

reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing, upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part."

Sec. 2203 empowers the Commission *to investigate rates* made by persons holding water leases from the Territory of Hawaii.

Sec. 2204 provides the procedure by the Commission to secure to consumers reasonable rates for water and to cancel water leases and licenses charging unreasonable rates.

Section 15, Act 89, S. L. Haw. 1913; Section 2205, R. L. Haw. 1925, provides a penalty of one thousand dollars for every violation of any order of the Commission or of any provision of this chapter.

Section 16, Act 89, S. L. Haw. 1913; Section 2206, R. L. Haw. 1925, provides that any person testifying falsely before the Commission shall be guilty of perjury.

Section 17, Act 89, S. L. Haw. 1913 as amended by Act 127, S. L. Haw. 1913; Section 2207, R. L. Haw. 1925, provides:

"Sec. 2207. *Finances.* All salaries, wages and expenses, including traveling expenses, of the com-

mission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year *by each public utility which is subject to investigation by the commission* a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

Section 18, Act 89, S. L. Haw. 1913; Section 2208, R. L. Haw. 1925, provides:

"Sec. 2208. *Definitions.* The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indi-

rectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air *between points within the Territory*, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Section 19, Act 89, S. L. Haw. 1913; Section 2209, R. L. Haw. 1925, provides:

"Sec. 2209. *Validity of this chapter.* If any section, sub-section, sentence, clause or phrase of this chapter shall for any reason be held to be invalid as to any or all matters within its terms, such decision shall not affect the validity of the remaining portions of this chapter, or the validity of such portion as to any other matter within its terms."

Section 20, Act 89, S. L. Haw. 1913; Section 2210, R. L. Haw. 1925, provides:

"Sec. 2210. *Application of this chapter.* This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."



**APPENDIX B.**

Act 135, Session Laws of 1913, provides:

**"AN ACT**

**"Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating thereto.**

**"Be it Enacted by the Legislature of the Territory of Hawaii:**

**"Section 1. The franchises granted by Act 30 of the Laws of 1903 of the Territory of Hawaii, as amended and approved by an Act of Congress approved April 21, 1904, Act 48 of the Laws of 1903 of said Territory, as amended and approved by an Act of Congress approved April 21, 1904, Act 66 of the Laws of 1905 of said Territory, as amended and approved by an Act of Congress approved June 20, 1906, Act 105 of the Laws of 1907 of said Territory, as amended and approved by an Act of Congress approved February 6, 1909, Act 130 of the Laws of 1907 of said Territory, as amended and approved by said Act of Congress, approved February 6, 1909, Act 115 of the Laws of 1909 of said Territory, as amended and approved by an Act of Congress approved June 25, 1910, and Act 66 of the Laws of 1911 of said Territory, as amended and approved by an Act of Congress approved August 1, 1912, and the persons and corporations holding said franchises, shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of Act 89 of the Laws of 1913 of said Territory creating a public utility commission and all amendments thereof for the regulation of public utilities in said**

Territory, and all the powers and duties expressly conferred upon or required of the Superintendent of Public Works or the courts by said acts granting said franchises are hereby conferred upon and required of said public utility commission and any commission of similar character that may hereafter be created by the laws of said Territory, and said acts granting said franchises are hereby amended to conform herewith.

"Section 2. This Act shall take effect upon its approval by the Congress of the United States.

"Approved this 29th day of April, A. D. 1913.

"WALTER F. FREAR,  
"Governor of the Territory of Hawaii."

## APPENDIX C

Act of Congress of March 28, 1916 (39 Stat. at L. 38, c. 53), provides: .

"An Act to ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of the Territory of Hawaii, entitled 'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto,' approved by the governor of the Territory April twenty-ninth, nineteen hundred and thirteen, be, and is hereby, *amended*, ratified, approved, and confirmed, as follows:

## 'ACT 135

'An Act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

'Be it enacted by the Legislature of the Territory of Hawaii:

'SEC. 1. The franchises granted by Act thirty of the laws of nineteen hundred and three of the Territory of Hawaii, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act forty-eight of the laws of nineteen hundred and three of said Territory, as amended and approved by an Act of Congress approved April twenty-

first, nineteen hundred and four; act sixty-six of the laws of nineteen hundred and five of said Territory, as amended and approved by an Act of Congress approved June twentieth, nineteen hundred and six; act one hundred and five of the laws of nineteen hundred and seven of said Territory, as amended and approved by an Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and thirty of the laws of nineteen hundred and seven of said Territory, as amended and approved by said Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and fifteen of the laws of nineteen hundred and nine of said Territory, as amended and approved by an Act of Congress approved June twenty-fifth, nineteen hundred and ten; act sixty-six of the laws of nineteen hundred and eleven of said Territory, as amended and approved by an Act of Congress approved August first, nineteen hundred and twelve; *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii*, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting

said franchises are hereby amended to conform herewith; *Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce: And provided further, That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory.*

'Sec. 2. This Act shall take effect upon its approval by the Congress of the United States.

'Approved the twenty-ninth day of April, anno Domini nineteen hundred and thirteen.

'WALTER F. FREAR,  
'Governor of the Territory of Hawaii.

'Approved, March 28, 1916.' "

---

NOTE: The italicized portions indicate additions to Act 135, S. L. Haw. 1913, made by Amendment of Congress.



## APPENDIX D

For the convenience of the Court, there is reprinted hereunder copies of the statutes referred to by the Supreme Court of the Territory of Hawaii in its opinion on *Reserved Questions*, (R. 25) showing that similar powers of investigation have been granted to administrative bodies by the various states.

**ALABAMA**—(Ala. Code, 1928):

"Sec. 9669. (5720). *Alabama commission may assist and apply to interstate commerce commission.* The commission shall investigate all complaints filed with them of the violation by the transportation companies doing business in this state of the rules, orders, and regulations of the interstate commerce commission, and when, in their opinion, the rates or charges of said transportation companies are excessive or discriminatory, or are levied in violation of the interstate commerce law, the commission shall present the facts to the transportation company with a request to make such changes as the commission may advise, and if such changes are not made within a reasonable time, the commission shall apply by petition to the interstate commerce commission for relief."

**ARKANSAS**—(Crawford & Moses, *Dig. of Stats. of Ark.* 1921):

"Sec. 1630. *Freight rates.* The state Commission shall have power and it is hereby made its duty to investigate all through freight rates and regulations on railroads in Arkansas; and when the same are, in the opinion of the Commission, excessive or levied in violation of the interstate commerce law, or the rules and regulations of the Interstate Commerce Commission, the officials of the railroad are to be notified of the facts and requested to reduce them or make the proper correc-

tion as the case may be. When the rates are not changed or the proper corrections are not made, according to the request of the Commission, the latter is instructed to notify the Interstate Commerce Commission and to apply to it for relief."

*ARIZONA—(Struckmeyer, Revised Code Ariz. 1928):*

"Sec. 691. *Interstate rates.* The commission may investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are excessive or discriminatory or in violation of the acts of congress or in conflict with the orders or requirements of the interstate commerce commission, the commission may apply to the interstate commerce commission or to any court of competent jurisdiction for relief."

*CALIFORNIA—(Hyatt, part two, Henning's General Laws of Calif. 1920):*

*"Power to investigate interstate rates.*

"Sec. 34. The commission shall have the power to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory or in violation of the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and sup-

plementary thereto, or of any other act of congress, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission may apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief.

*GEORGIA—(II Park's Ann. Code, Ga. 1914):*

"Sec. 2645. *Commissioners to investigate through rates.* It shall be the duty of the railroad commission to investigate thoroughly all through freight rates from points out of Georgia to points in Georgia, and from points in Georgia to points out of Georgia.

"Sec. 2646. *Report improper charges to railroad officials.* When the commission finds that a through rate, charged into or out of Georgia, is in their opinion excessive or unreasonable, or discriminatory in its nature, it shall call the attention of the railroad officials of Georgia to the facts, and urge upon them the propriety of changing such rate or rates.

"Sec. 2647. *If not changed, to report to interstate commission.* Whenever such rates are not changed according to the suggestion of the railroad commission, it shall be the duty of the commission to present the facts, whenever it can legally be done, to the interstate commerce commission, and to appeal to it for relief."

*IOWA—(Code of Iowa, 1927):*

"Sec. 7890. *Interstate freight rates.* The Board shall exercise constant diligence to ascertain the rates, charges, rules, and practices of common carriers operating in this state, in relation to the transportation of freight in interstate business. When it shall ascertain from any source or have reasonable grounds to believe that the rates

charged on such interstate business or the rules or practices in relation thereto discriminate unjustly against any of the citizens, industries, interests, or localities of the state, or place any of them at an unreasonable disadvantage as compared with those of other states, or whether in violation of the laws of the United States regulating commerce, or in conflict with the rulings, orders, or regulations of the interstate commerce commission, the board shall take the necessary steps to prevent the continuance of such rates, rules, or practices.

"Sec. 7891. *Application. Interstate commerce commission.* When any common carrier has put in force any rates, rules or practices in relation to interstate freight business, in violation of the laws of the United States regulating commerce, or of the orders, rules or regulations of the interstate commerce commission, or shall unjustly discriminate against any of the citizens, industries, interests, or localities of the state, the board shall present the material facts involved in such violations or discrimination to the interstate commerce commission and seek relief therefrom, and if deemed necessary or expedient, the board shall prosecute any charge growing out of such violation or discrimination, at the expense of the state, before the interstate commerce commission."

KANSAS—(*Revised Stat. of Kan. Ann., 1923*):

"Sec. 66-148. *Through rates.* The public utilities commission shall have power, and it is hereby made its duty to investigate all freight rates on railroads in Kansas; and when the same are in the opinion of the commission excessive, or levied in violation of the interstate commerce law, or the rules and regulations of the interstate commerce commission, the officials of such railroad shall be notified of the facts and requested to reduce the

rates or make the proper corrections, as the case may be. When the rates are not changed or the proper corrections are not made, according to the request of the public utilities commission, the latter shall notify the interstate commerce commission, and apply to it for relief, by filing a complaint; and all the cases commenced before the interstate commerce commission under the authority conferred by this section shall be brought in the name of the public utilities commission of the state of Kansas, by the attorney for the commission, and all such cases shall be prosecuted at the expense of the state."

*MARYLAND*—(1 Ann. Code—Bagby, p. 835, Art. 23):

"Sec. 348. The commission may investigate freight rates on interstate traffic of common carriers within the state, and when such rates are, in the opinion of the commission, excessive or discriminatory, or are levied or laid in violation of the interstate commerce law, or in conflict with the ruling, orders or regulations of the interstate commerce commission, the commission may apply by petition to the interstate commerce commission for relief, or may present to the interstate commerce commission all facts coming to its knowledge, as to violations of the rulings, orders or regulations of that commission, or as to violations of the interstate commerce law."

*MINNESOTA*—(General Statutes, 1923):

"Sec. 4719. *Railroad and Warehouse Commission Authorized to Co-operate with Interstate Commerce Commission.* The Railroad and Warehouse Commission is hereby authorized to co-operate with the Interstate Commerce Commission for the purpose of harmonizing state and federal regulations of the common carriers within the State of Minnesota to the extent and in the man-



ner deemed advisable by the Railroad and Warehouse Commission.

"Sec. 4720. *Joint Hearings.* The Railroad and Warehouse Commission may conduct joint hearings with the Interstate Commerce Commission within or without the State of Minnesota.

Sec. 4721. *May participate in Proceedings.* The Railroad and Warehouse Commission is hereby authorized to appear and participate in any proceedings pending before the Interstate Commerce Commission when it considers such appearance and participation advisable and in the interest of the people of the State of Minnesota.

"Sec. 4660. *Interstate Commerce Commission. Authority of State Commission to Institute Proceedings.* Whenever a resident of this state shall file with the State railroad and warehouse commission of the United States, charging any railroad company or other common carrier doing business in this state, engaged in interstate transportation of freight, with any violation of the interstate commerce act of the United States, setting forth in such petition the facts constituting such violation, such railroad commission, if they deem the matter one of public interest, shall file said petition with the interstate commerce commission and thereupon shall appear in said matter in the place of said petitioner and thereafter prosecute the same at the expense of the state."

*MISSOURI—(Rev. Statutes of Missouri, (1909) Vol. I, p. 1178):*

"Sec. 3253. *Commissioners to Enforce Reasonable Rates.* It is hereby made the duty of the railroad commissioners to exercise constant diligence in informing themselves of the rates and charges of the common carriers engaged in the transportation of freight from points of this state to points

beyond its limits, and from points in other states to points in this state; and whenever it shall come to the knowledge of the railroad commissioners, by complaint made to them or in any other manner, that the rates charged by any such common carrier on interstate business are unjust, excessive or unreasonable, or that such rates discriminate against the citizens of the state, the commissioners shall cause the facts thereof to be embodied in a complaint setting forth, in detail, the respect in which the rate complained of is unjust, excessive or unreasonable, and shall file said complaint with the interstate commerce commission and demand a hearing thereof, and shall thereafter furnish testimony in support thereof, and diligently present the facts upon which such complaint is based. At the time of filing said complaint, the railroad commission shall give notice thereof to the attorney-general, who shall prosecute the same to final determination before the said interstate commerce commission."

NEW YORK—(*Cons. Laws of N. Y.—Cahill, (1930) Chapter 49, p. 1878*):

"Sec. 59. *Duties of the Commission as to Interstate Traffic.* Either commission may investigate interstate freight or passenger rates or interstate freight or passenger service on railroads within the state, and when such rates are, in the opinion of either commission, excessive or discriminatory or are levied or laid in violation of the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders or regulations of the interstate commerce commission, and the commission may apply by petition to the interstate commerce commission for relief or may present to the interstate commerce commission all facts coming to its

knowledge, as to violations of the rulings, orders, or regulations of that commission or as to the violations of said act to regulate commerce or acts amendatory thereof or supplementary thereto."

**NORTH CAROLINA**—(*Cons. Stat. Ann.* (1919) p. 464):

"Sec. 1075. *Interstate Commerce.* Upon the complaint of any person or a community to the commission of any unjust discrimination or unjust or unreasonable rate in carrying freight which comes from or goes beyond the boundaries of the state by any railroad whether organized under the laws of this state or of another state doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commission to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney general of the state, and he shall represent them before the interstate commerce commission."

**NEW HAMPSHIRE**—(*Public Laws*, 1926 Vol. II, p. 923):

/"*Investigation of interstate commerce.*

"22. *Investigations.* The commission may, upon complaint, investigate all existing or proposed interstate rates, fares, charges, classifications and rules and regulations relating thereto, where any act thereunder may take place within this state.

"23. *Petitions, etc.* When the same are found to be, in the opinion of the commission unjust, unreasonable, unjustly discriminatory or otherwise in any respect in violation of the provisions of the act to regulate commerce, or of any other act of congress, or in conflict with the rules and orders

of the interstate commerce commission, or of any other department of the federal government, the commission may apply for relief by petition or otherwise to the interstate commerce commission or to any other department of the federal government, or to any court of competent jurisdiction."

OREGON—(2, Olsen, *Genl. Laws of 1920*, p. 2374):

"Sec. 5872. *Investigation of Interstate Rates. Proceedings before Interstate Commerce Commission.* The public service commission shall have power, and it is hereby made its duty, to investigate all interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state, and when the same are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall present the facts to the railroad or other affected or interested utility, with the request to make such changes as the commission may advise, and if such changes are not made within a reasonable time the commission shall apply by petition to the interstate commerce commission all facts coming within its knowledge as to violations of the rulings, orders or regulations of that commission, or as to violations of the said act to regulate commerce or acts amendatory thereof or supplementary thereto. All tariffs issued by any railroad or utility relating to interstate traffic in this state shall be filed in the office of the commission within thirty days after the passage of this act, and all such tariffs thereafter issued shall be filed with the commission when issued."

*PENNSYLVANIA—(West, (1920) p. 1750):*

"Sec. 18135. *Powers as to Interstate Traffic.* The Commission may investigate the rates of interstate traffic facilities or service of common carriers within this Commonwealth, and when such rates, facilities, or service are, in the determination of the commission, unjust, unreasonable, or unjustly discriminatory, or unduly or unreasonably preferential, or in violation of the interstate commerce law, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply by petition to the said Interstate Commerce Commission for relief, or may present to the said Interstate Commerce Commission all facts coming to its knowledge as to the violation of the rules, orders, or regulations of that commission, or as to the violations of the interstate commerce law."

*SOUTH DAKOTA—(Compiled Laws, 1929, Vol. II, p. 3264):*

"Sec. 9577. *Petition Interstate Commerce Commission.* Whenever a resident of this state shall file with the board of railroad commissioners a petition, directed to the interstate commerce commission of the United States, charging any railroad or other common carrier doing business in this state, engaged in interstate transportation of freight, with any violation of the interstate commerce act of the United States, setting forth any such petition of facts constituting such violation, such board, if it deems the matter one of public interest, shall file such petition with such interstate commerce commission and thereupon shall appear in such matter in the place of such petitioner and thereafter prosecute the same at the expense of the state.

"Sec. 9578. *Appear before Interstate Commerce Commission.* Whenever any matter shall be pend-



ing before the interstate commerce commission of the United States, between a resident of this state as petitioner and any railroad or other common carrier doing business in this state and engaged in interstate transportation of freights, charging such carrier with any violation of such interstate commerce act, upon application of the petitioner the board of railroad commissioners, in case it deems the questions involved of public interest, may appear therein and be substituted as a party in place of such petitioner and thereafter such matter shall be prosecuted by such board at the expense of the state in the same manner as though originally begun by it."

*WISCONSIN—1 Wis. Stat. Sec. 1797-21, p. 1536. Sec. 21 of the Railway Commission Act is a copy of the Oregon law cited above.*



# SUPREME COURT OF THE UNITED STATES.

No. 94.—OCTOBER TERM, 1938.

Inter-Island Steam Navigation Com-  
pany, Limited, Petitioner,

vs.

Territory of Hawaii by Public Utilities  
Commission of the Territory of  
Hawaii, Respondent.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Ninth Circuit.

[December 5, 1938.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner, a Hawaiian corporation, is a common carrier of freight and passengers by water between different points in the Territory. A substantial part of its gross income is derived from transporting freight destined for trans-shipment to foreign or mainland ports. In 1913 a statute of the Territory created a Public Utilities Commission, prescribed its duties and levied a uniform semi-annual tax—denominated a fee<sup>1</sup>—upon all public utilities doing business in the Territory, partially to defray the Commission's expenses. Petitioner paid the tax until 1923, when it refused to make further payments, contending the tax could not validly be applied to it. In this suit, the Territory recovered judgment in the territorial court for the taxes assessed for the years 1923 to 1930, inclusive. The Supreme Court of Hawaii and the Circuit Court of Appeals both affirmed.<sup>2</sup>

The Hawaiian "Utilities Act of 1913,"<sup>3</sup> under which the challenged taxes have been levied, invested the territorial Commission with broad powers to investigate all public utilities doing business in the Territory, with reference to the safety and accommodation of the public; safety, working hours and wages of employees; rates and fares; valuation; issuance of securities; amount and dispo-

<sup>1</sup> Cf., *New York v. Latrobe*, 279 U. S. 421, 423.

<sup>2</sup> 233 Haw. 890. 96 Fed. (2d) 412. Certiorari granted, — U. S. —.

<sup>3</sup> Act 89 S. L. Haw. 1913, as amended by Act 127, S. L. Haw. 1913, c. 132, of the Revised Laws Hawaii, 1925, c. 261, Revised Laws Hawaii, 1935.

2      *Inter-Island Steam Navigation Company vs. Hawaii.*

sition of income; business relations with others; compliance with territorial and Federal laws and provisions of franchises, charters, and articles of association; regulations, practices and service; accidents, in connection with utility operations, believed by the Commission to require investigation and "all matters of every nature affecting the relations and transactions between . . . [such utilities] and the public, or persons, or corporations."

This territorial Commission was empowered to make its investigations "notwithstanding that the same may be within the jurisdiction of the Interstate Commerce Commission, or within the jurisdiction of any Court or other body, and when after such examination the [territorial] commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the Interstate Commerce Commission, or such Court, or other body, in its own name or the name of the Territory, . . . ."

The taxes in question accrued under Section 17 of the Act of 1913, providing that "There shall . . . be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which will be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, . . . .". After collection, the taxes "shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' " to be used—with any appropriations made available by the territorial legislature—to pay necessary expenses of the Commission in the performance of its duties under the Act.

The Organic Act granting legislative power to the territorial government of Hawaii provides that "the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . . ." Pursuant to the Organic Act, and prior to

<sup>4</sup> Act of Cong., April 30, 1900, c. 339, § 55 (31 Stat. 150; U. S. C., Title 48, § 562).

the effective date of the Utilities Act of 1913, the territorial legislature passed Act 135 S. L. Haw. 1913—to take effect upon the approval by Congress—providing that all public utilities previously granted franchises should “be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of [the Utilities Act of 1913] and all amendments thereof for the regulation of public utilities in said Territory . . . .” March 28, 1916,<sup>5</sup> Congress expressly ratified, approved and confirmed this Hawaiian Act 135.

Act 135 as enacted by the Territory applied only to Hawaiian utilities specially described in the Act. However, Congress in ratifying and approving, broadened the Act by amendment so as to include not only the described utilities but “all public utilities and public-utilities companies organized or operating within the Territory of Hawaii.” By further amendment Congress provided that nothing in Act 135 should “limit the jurisdiction or powers of the Interstate Commerce Commission” and that all actions of the Hawaiian Public Utility Commission should “be subject to review by the courts of the . . . Territory.”

September 7, 1916, Congress enacted the “Shipping Act of 1916.”<sup>6</sup> For the purposes of the Shipping Act, “The term ‘common carrier by water in interstate commerce’” was given a statutory definition to include “a common carrier . . . by water of passengers or property . . . on regular routes from port to port between . . . places in the same ‘Territory, District or possession.’” This Act created the United States Shipping Board, with broad powers to investigate and supervise carriers by water in foreign and interstate commerce as defined therein.

We accept the conclusion of the Supreme Court of Hawaii that petitioner is a public utility as defined by the Hawaiian Act.<sup>7</sup> However, petitioner contends that the Territory cannot validly apply this tax to it. We have examined all of the grounds upon which this contention rests. None is sufficient to remove petitioner from the operation of the Utilities Act of 1913 as applied here.

First, Petitioner contends that the passage of the Shipping Act by Congress completely ousted the territorial Commission of all jurisdiction over it in any respect, or for any purpose, and thus withdrew the Commission’s power to collect the fees in question.

<sup>5</sup> 39 Stat. at L. 38, c. 53.

<sup>6</sup> 39 Stat. 728, c. 451, Act of September 7, 1916.

<sup>7</sup> Cf., *Waiialua Agricultural Co. v. Christian et al.*, — U. S. —.



#### 4 *Inter-Island Steam Navigation Company vs. Hawaii.*

The Supreme Court of Hawaii held in this case, as heretofore,<sup>8</sup> that the Shipping Act did deprive the territorial Commission of authority, under the Act of 1913, to regulate by its own order the rates of this petitioner. In the present case, however, that court concluded that the Shipping Act did not withdraw the territorial Commission's power to *investigate* water carriers—such as petitioner—as to rates and other matters, either for the exercise of its own permitted supervisory powers or for presentation of the public's case before appropriate governmental bodies.<sup>9</sup> The territorial Act of 1913—to which Congress in 1916 subjected all utilities doing business in Hawaii—gave the territorial Commission jurisdiction over many matters other than rate regulation. In general, the Commission was empowered to supervise and regulate local properties and activities of utilities and to protect the public interest in relation to rates, operations, and many other phases of the utility business. While, in some instances, the Commission was powerless to enter any final order, nevertheless its authority to investigate and to appear before appropriate governmental agencies was designed as a part of a general plan to safeguard the public interest. The Shipping Act invested the Shipping Board with authority over some of these matters. But no language in that Act indicates that Congress intended to withdraw all of the territorial Commission's jurisdiction over territorial water carriers. While Congress had complete power to repeal the entire territorial Public Utilities Act, "an intention to supersede the local law [of Territory] is not to be presumed, unless clearly expressed."<sup>10</sup> Petitioner

<sup>8</sup> *Re Inter Island S. N. Co.*, 24 Haw. 136.

<sup>9</sup> Similarly, many states have authorized utility commissions to make investigations and to institute proceedings before the Interstate Commerce Commission. Ala. Code (Michie), 1928, Sec. 9669; Crawford & Moates Dig. of Stats. of Ark. 1921, Sec. 1630; Struckmeyer, Revised Code Ariz. 1928, Sec. 69b; Gen. Laws of Calif., 1937 (Deering), § 34; Code of Ga., 1933, § 93-314; Code of Iowa, 1931, §§ 7520, 7891; Revised Stat. of Kan. Ann., 1923, Sec. 66-148; Md., 1 Ann. Code—Bagby, p. 835, Art. 23, Sec. 384; 1 Mason's Minn. Stat. (1927), § 4660; Rev. Statutes of Missouri (1929), Sec. 5187; Cons. Laws of N. Y.—Cahill (1930), Chapter 49, p. 1878; Sec. 59; (North Carolina) Cons. Stat. Ann. (1919), p. 464, Sec. 1075; New Hampshire Public Laws, 1926, Vol. II, p. 923, (22, 23); 2, Olson, Ore. Laws of 1920, p. 2374, Sec. 5872; 66 Purdon's Penna. Stat., § 552; (South Dakota)—Compiled Laws, 1929, Vol. II, p. 3264, Sec. 9577-8; (1935) Wis. Stat., Sec. 195.17.

"In its general scope and purpose, as well as in its terms, [the Shipping Act] closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." *U. S. Nav. Co. v. Cunard S. S. Co.*, 234 U. S. 474, 481.

<sup>10</sup> *France v. Connor*, 161 U. S. 65, 72; see *Davis v. Beason*, 153 U. S. 333; *Cope v. Cope*, 137 U. S. 682; cf., *Savage v. Jones*, 225 U. S. 501, 533; *Gilman v. Cuyahoga Valley Ry.*, 292 U. S. 57, 60.

tioner owns, controls, operates and manages numerous steam vessels, wharfs, docks and real and personal property useful in the transportation of passengers and freight between the various ports and islands of Hawaii. Petitioner's gross income between the years 1922 and 1929 from business transacted in the Territory amounted to approximately \$18,000,000. This Territory is located far from the mainland of the United States. Only clear and explicit statutory language could justify a holding that Congress intended by the Shipping Act to deprive the territorial government of *all* jurisdiction over activities such as petitioner's, vitally affecting the trade, commerce, safety and welfare of the people of the Territory.

We agree with the Supreme Court of Hawaii that the Shipping Act of 1916 did not wholly supersede the territorial Act of 1913 as applied to water carriers like petitioner, and did not take from the territorial Commission its power to investigate such utilities. A valid legislative power necessarily includes the right to provide funds to be expended in its exercise.

*Second.* Petitioners contend, however, that the taxes involved constitute a burden on interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution. But here, Congress, by its Act of 1916, subjected petitioner to the territorial law under which these very taxes were levied.

Under the Constitution, Congress has the power to regulate interstate commerce.<sup>11</sup> Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an Act to which Congress expressly subjected petitioner does not violate the Commerce Clause.

Congress had the power to subject petitioner to this tax by virtue of its authority over the Territory, in addition to its power under the Commerce Clause. "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full

<sup>11</sup> For illustrations of the extent of this power, see *Gibbons v. Ogden*, 9 Wheaton 1, 196; *In re Rahrer*, 140 U. S. 545; *Second Employers' Liability Cases*, 223 U. S. 1; *Houston & Texas Ry. v. United States (Shreveport Case)*, 234 U. S. 342; *Clark Distilling Co. v. West'n Md. Ry. Co.*, 242 U. S. 311; *Alabama Ry. v. Jackson Ry.*, 271 U. S. 244, 250.

6 *Inter-Island Steam Navigation Company vs. Hawaii.*

and complete legislative authority over the people of the Territories and all the departments of the territorial governments."<sup>12</sup>

*Third.* Petitioner contends that the challenged tax is prohibited by the Fifth Amendment because "no investigation, supervision, or regulation of petitioner was in fact made by the Commission."

A general tax designed to effectuate a plan for control and supervision of public utilities need not be apportioned among the taxpayers according to the actual services performed directly for each. Such a requirement would seriously impair the effective application and operation of general tax systems. Services performed by the Hawaiian Public Utilities Commission were for the benefit of the public as a whole and are not any the less services beneficial to petitioner because its business has not been given any special assistance.<sup>13</sup> "A tax is not an assessment of benefits."<sup>14</sup>

The judgment is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

<sup>12</sup> *Mormon Church v. United States*, 136 U. S. 1, 43; cf., *Seve v. Pitot*, 6 Cranch 332, *The American Ins. Co. et al v. Canter*, 1 Pet. 511, *Door v. United States*, 195 U. S. 138, *Cincinnati Soap Co. v. United States*, 301 U. S. 308.

<sup>13</sup> Cf. *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 266.

<sup>14</sup> *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 522.